MINUTES
Montana Fish, Wildlife & Parks Commission Meeting
1420 East Sixth Avenue
Helena, MT 59620

March 21, 2002

Commission Members Present: Dan Walker, Chairman; Tim Mulligan, Vice-Chairman; John Lane and Mike Murphy.

Fish, Wildlife & Parks Staff: Jeff Hagener, Director; and other Department personnel.

Guests: John Wilson, MT Trout Unlimited; Jim Panagopoulos, Missouri River Shooters; Mike Sedlock, Walleyes Unlimited; Don Nickman, PPSA; Larry Copenhaver, MT Wildlife Federation; Paul Hartman, mineral owner, Miles City; Robin Cunningham, Fishing Outfitters and Anglers of MT (FOAM); Donald Bice, land owner, Miles City; Cal Christian, attorney, Miles City.

Present but did not sign in: Bill Summers, Les Hirsch, John Hamilton, Lance Lovell.

Topics of Discussion:
1. **Opening - Pledge of Allegiance**
2. **Approval of Commission Minutes, February 20 & 21, 2002**
3. **Approval of Commission Expenses through February 28, 2002**
4. **30-year Service Award Presentation to Larry Peterman**
5. **Ft. Peck Management Plan - Information**
6. **Future Fisheries Projects - Final**
7. **Fishing Tournament Rules - Final**
8. **Two-day Resident Fishing License Fee Refund - Final**
9. **Automated Licensing System (ALS) Update - Information**
10. **Lewis and Clark Interpretative Center, Region 4 - Final**
11. **Bice/Hirsch Conservation Easement, Region 7 - Final**
12. **Snowmobile Water Skipping Rule - Final**

1. Opening - Pledge of Allegiance. Chairman Dan Walker called the meeting to order at 8:10 a.m. and led the Pledge of Allegiance. He announced that Commissioner Darlyne Dascher would not be at the meeting today.

2. Approval of Minutes for February 20-21, 2002 Commission Meeting. Commissioner Tim Mulligan noted an insertion to be made on page 8 under his comments.

__ACTION:__ With the above change, __Commissioner Mulligan__ moved approval of the minutes of the February 20 and 21, 2002 meeting. __Commissioner John Lane__ seconded. __Motion passed__.

3. Approval of Commission Expenses through February 28, 2002.

ACTION: ***Commissioner Mike Murphy*** *moved approval of the Commission expenses through February 28, 2002.* ***Commissioner Lane*** *seconded.* ***Motion passed.***

4. Thirty-year Service Award Presentation to Larry Peterman. Director Jeff Hagener read a commendation letter to Larry Peterman, Chief of Field Operations, which outlined his background and awards. Director Hagener then presented him with the letter and an award for his 30 years of service with Montana Fish, Wildlife & Parks.

5. Ft. Peck Management Plan - Information. Chris Hunter, Fisheries Division Administrator - The department began preparation of the Ft. Peck Management Plan in December 2000, with a series of public scoping meetings. Director Hagener signed the final plan in early March 2002. The public has a 30-day opportunity to file an appeal of the plan to the Commission. He said two people have indicated they might appeal, but nothing has been received to date. If an appeal is filed by April 8, the Commission could hear it at the April 17-18 meeting in Glasgow. **Hagener** said most of the feedback he has heard is positive but water conditions will still be a large factor. **Hunter** said they have been talking with North and South Dakota about their contributing fingerlings to this effort. **Walker** asked if this was a contribution from those states. Hunter said it is a reciprocal agreement.

6. Future Fisheries Projects - Final. **Glenn Phillips**, Fisheries Habitat Protection Bureau Chief - They have had the Future Fisheries Program since 1995 with the purpose to restore habitat in lakes, rivers and streams for wild fisheries. Wild fish are those that reproduce naturally in the wild and don't require stocking to sustain the population. Their projects include grazing management to protect riparian areas, improvement of fish passage, screening of irrigation diversions, installation of barriers in streams to protect genetically pure populations of native fish, enhancement of spawning habitat, reconstruction of stream channels where habitat has been severely degraded, and water conservation projects. The program has two funding cycles yearly. In one the project proposals are due January 1 and the other by July 1. Proposals are considered by a 13-member citizen review panel to determine which projects are eligible for funding. The director appoints panel members and they may include legislators, landowners, sportsmen and professionals such as hydrologists and fishery biologists. The recommendations for funding that are brought before the Commission are recommendations of that panel and not of the department. The panel usually meets in January and July about two weeks after the applications are received. The department then comes before the Commission in March and September of each year for action on the recommendations, so that will be a routine part of the Commission agenda during those months.

He then asked the Commission if they wanted to see all of the applications for funding or only those for their particular area. **Mulligan** recommended that, at least for a while, everyone should receive all of them and Commissioner **Murphy** concurred in order to get a statewide perspective. **Phillips** said they usually send them out the first week of January and again the first week of July, and agreed to send them to all of the commissioners.

Phillips said for this funding cycle they are asking for Commission approval on 22 projects with a total dollar amount of about $316,000. About seven are channel restoration projects, six are riparian enhancements, four are to prevent loss of fish into diversions, two are to improve spawning substrates in reservoirs, one is a stream flow enhancement project, one is to improve fish passage and one is a stream bank stabilization project. **Walker** said correspondence from Commissioner **Dascher** questioned the Beaver Creek project expressing concern over off-site water development. **Phillips** said this is just a channel restoration project, which includes riparian fencing. There is no water development associated with it. **Walker** said **Dascher's** next question dealt with project numbers 5 and 13, and concern over the high cost. **Phillips** said in the past these projects have been smaller scale. They are doing a lot more work now than in the past, which accounts for the higher cost. **Walker** said another concern Commissioner **Dascher** had was with Item 7, Cottonwood Creek in Powell County. She supports it provided the water saved is converted to in-stream use**.** **Phillips** said that came up with their review panel and it is a requirement of the project. **Walker** said that finally, Commissioner Dascher is concerned with Item 12, asking if there is any off-site water development for livestock. **Phillips** said, "No, there is not." He also said that Eric Reiland, a fisheries biologist working out of the Missoula office, is coordinating that project.

Mulligan had questions on Items 8 and 9, Sweetgrass County on the East Boulder River and Elk Creek. Other funding sources are referred to there and would like that explained. **Phillips** said these projects sort of fell into the category of being non-point source water quality kinds of improvements. Oftentimes, those kinds of projects are funded through the 319 program administered by DEQ. There is a new watershed group formed in the Boulder River drainage. Both of the projects came from that group, they are just getting started and want to do the right thing. What came out of the review panel was they might look at other funding sources. **Walker** asked what is likelihood the funds will be received. **Phillips** said the 319 proposals come in as a group for doing work in the whole watershed for controlling non-point sources of pollution. The chances are very good if they do that. **Mulligan** asked about Item 15, the Three Dollar Bridge, and if work will be done entirely on the part to be kept, or will some be done on the part being sold? The response was it would be done on the portion that is sold to the buyer. So it would be protected through the easement. **Phillips** said that on that stream they did a restoration project on the lower reach some years ago. It is being extended beyond what was restored previously. **Mulligan** asked about Item 19, Potosi Creek, what is a reasonable cost for fencing? **Phillips** said that normally fencing runs $1/foot. Depending on what is done, it can be more. For that one, the department had recommended some funding to the review panel. Part of the thinking was that because it was so small administratively it was not worth doing. **Mulligan** asked about item 27, Stone Creek, if agreements were in place on the road? **Phillips** said his understanding is the road will be retired and moved higher on the bench. **Mulligan** said as long as the agreement is in place, it is fine. **Phillips** said they have done restoration work already and will extend what they had been doing. **Walker** wanted clarified that they do not support funding on Item 18. **Phillips** said that is correct.

ACTION: ***Mulligan*** *moved approval of the Review Panel's recommended Future Fisheries Projects as proposed.* ***Murphy*** *seconded.* ***Motion passed****.*

Phillips mentioned they are having a field trip for the Review Panel on July 25 and the Commissioners are welcome to join them. They will probably go to the Blackfoot again as there are a lot of new projects going on there. **Walker** asked how many proposals would be coming before them at their April meeting in Glasgow. **Phillips** said not as many, probably less than 10 and perhaps less than 5.

7. Fishing Tournament Rules - Final. Chris Hunter - At the January meeting, the Commission approved draft fishing contest rules, they were released for public comment, three public hearings were held and they received a wide variety of comments. They ranged from those who were strong advocates of tournaments to those who don't like idea of tournaments at all. They made major changes in the tentative rules based upon those comments. A comment received was that the window for submitting applications was too restrictive and they have increased it to two months. They clarified that contest sponsors are only responsible for notifying participants of safety issues and the importance of cleaning boats before and after participation in contests. There was some comment about two contests competing for same date; and preference should be given to the contest that had been held on that date historically. Clarified time frames for department decisions on contests. Also clarified that the department may condition a contest to provide supplemental trash removal, restroom facilities or maintenance when necessary to meet the demands placed upon the facilities by contest participants. They simplified the prohibited contest provision in the rules. As previously written, it listed every fish of special concern. Rather than do that, they just referenced the list of fish of special concern. If a fish is added or taken off the list, they do not have to go back and change the ARM rule. Finally, they clarified the waiver provision for contest participants to high grade fish in livewells without counting released fish as part of the daily limit. They received the most comment on deleting the prohibition on all weigh-in format contests from July 1 through September 15. They took it out as a blanket item. The regional fish manager can then make decisions on a case-by-case basis.

Walker said he was concerned about cleaning of boats and what it means to get information out to participants. **Hunter** said information will be included on mail-in entry forms and the Fisheries Division will probably provide information that is included there. **Walker** said it is important it be clearly understood and there is benefit to repeating it over and over. **Hunter** said their intent is to provide the information for them so they can disseminate it to their tournament participants. **Mulligan** asked that No. 7 be explained. **Hunter** responded that it goes back to the fishing regulations, which say they can have more than the five fish in their livewell over the course of the tournament day, because they will all be released at the end of the day. **Mulligan** asked if a fisherman has more than five fish and they all die, can they be cited? **Hunter** said probably not with this provision. He said there are two formats for these tournaments. The Montana Walleyes tour uses a paper format, and they return to a weigh-in boat several times a day to have their fish weighed in. In those cases this probably won't be a problem. The other format, the weigh-in format, is generally not used by the Montana Walleyes tour. The national walleyes tour does use the weigh-in format. The tournament at Ft. Peck several years ago where there was 87% mortality is the one that caused a lot of controversy. Generally those weigh-in tournaments are used by bass tournaments on a national basis. Even though we have deleted the prohibition on all weigh-in contests from July 1 to September 15, the regional manager can deny

a permit because of timing of event, water body, etc. **Walker** said the organizers plan their tournaments and formats, but as we go through the year we could have temperature difficulties. **Hunter** said we can ask them to change a format a week before the tournament based upon historical water temperatures on those dates for that body of water. **Murphy** asked about No. 3, adding a provision to allow preference for historically permitted contests if there is a conflict, and if there was much comment. **Hunter** said it came up in Glasgow that people thought tournaments that had been going on for a number of years should have preference over new ones. **Murphy** asked if there was any negative response. **Hunter** said he hadn't heard of any. Mulligan said it is not clear why they are not citing people if they are knowingly wasting fish or overrunning the harvest. Holding those people accountable should make the fishing contest better. **Commissioner Lane** said he agrees. **Mulligan** said Enforcement should consider enforcing the rules on waste and overharvest in the tournaments. **Walker** said his initial thought was when a fisherman looks in the live well and sees a loss, there should be a deduction. **Hunter** said they do that; it's in the rules. **Walker** said we could deal with that in the future, and/or if they were over the limit, the fish not surviving would not make it to the weigh-in dock. Then creating a rule that doesn't solve the problem. **Mulligan** said typically there are other people in the boat to oversee that sort of activity. **Hunter** said the walleyes folks typically have two people in the boat on the same team. For bass tournaments, there will be competitors in the same boat so they can monitor each other. The weigh-in format is almost entirely bass contests. Walker said they are hearing bass tournaments don't suffer losses like walleyes. **Hunter** said that is correct. They are more of a warm water fish than walleye.

*ACTION: **J. Lane** moved to accept the fishing contest rules as presented; **Murphy** seconded. **Motion passed**.*

8. Two-day Resident Fishing License Fee Refund Rule - Final. **Hunter** said this rule was proposed at the Commission's request when the two-day resident fishing license was enacted last fall. The proposed rule allows residents who purchased a two-day license and then decide to upgrade to a seasonal license to get a refund on the two-day license fee. This draft rule was adopted at the January Commission meeting and released for public comment. They received no public comment on the rule and ask the Commission to approve this proposal as the tentative was adopted.

*ACTION: **Mulligan** moved approval of the two-day resident fishing license fee refund rule; **J. Lane** seconded. **Motion passed**.*

Hunter said **Glenn Phillips** has organized an ice fishing outing on Saturday, March 23, on Canyon Ferry. Any Commissioners who are interested may join them.

Walker said they are ahead of schedule, so will change the agenda so next item is an update on the Automated Licensing System.

9. Automated Licensing System (ALS) Update - Information. Director Hagener said it is going fairly well. Questions coming from some areas are about the amount of time required for dial-up, particularly if a machine shuts down for a while. **Walker** said he is interested in why

some license agents have dropped. **Hagener** said he is not sure any dropped after the ALS was there. Some chose not to go into it at all. However, others asked to come in that weren't there before. **Mulligan** said there are things that need to be improved, but they can be identified, they can improve them and it will work fine. The dial-up is an issue because it has to dial every time you sell a license, and you can't keep the line open. There are inconsistencies in function keys; they are minor things that can be fixed. There are no fatal flaws. A lot of people don't like all the paper because it doesn't fit in their wallet. It is challenging training clerks. **Hagener** said they have heard concerns in some areas where agents aren't open all day Sunday. People will come to fish for a day or so, particularly non-residents, and they can't get a license. That really is not a different issue because of ALS, but it does give impetus to move forward with making them available on the internet in the near future. **J. Lane** asked if once an individual is entered, does the same information have to be re-entered? **Hagener** said one can go into the system either by name or by the new license number which stays with the person. The background information does not have to be entered again. **J. Lane** suggested once a youth passes the hunter safety course to enter the information right then. **Mulligan** said that was an excellent idea to enter it at time of receipt of the hunter education certificate. **Hagener** said a lot of effort was put into preloading of information from licenses last year, and asked if information from the hunter education certificates could be preloaded?

Barney Benkelman, Information Technology Bureau Chief - Not at this stage. The hunter education piece of things was for a later phase. In the future, however, will automatically tap into that database.

As Director Hagener said, things have been going well. Production has been in full operation since March 1. Have found a few bumps, but continue forward with phase 1.2, implementing pieces they were able to set aside to allow them to meet the schedule. They are implementing them now as it makes sense. Phase 2 analysis efforts are ongoing.

Passed out an updated statistics sheet through March 20, 2002. As of March 20, sold almost 59,000 items. Working with ITSD to minimize their downtimes and accommodating other agencies so FWP downtimes don't impact them. There are a few vendors that are still inactive or in pending status. They are either seasonal, or they couldn't attend training so they have to go back and work with those who couldn't fit into their schedule originally. They are addressing problems as quickly as they can. Some areas of concern for them include the end product. The pouch was not what they wanted and working on changing that. Trying to resolve problem of size of paper, but price is a consideration. The listing itself is a concern. The volume of paper people get is an issue they're trying to resolve. Part of their problem is vendors who supply these kinds of materials, and they must look at products that fit their needs better. The trainers will make another trip around the state the end of April. An internal team is helping with training. They are trying to address communications and connectivity as they struggle with faster connectivity and maintaining it. Intended for times where a line exists. There are several chronic problem sites and they're scheduling visits there. Ability of the help desk will be improving and now have people available at the help desk on weekends. The latest issue is need for additional machines; some agents are adamant they need more. Have to keep in perspective

and look for a good balance. Most agents will sell over 100 items only about 5 days a year. They are looking at the Internet option, and at possible leasing of machines.

Walker asked when was the biggest crunch time? **Benkelman** said one is the end of May right before applications for elk permits are due, and other one is just before general hunting season opens in October. **Mulligan** asked for leniency on number of paper copies during those recognized times. Need to be aware of way the phone company operates where they pre-bill. With a lot of them there will be two months on phone bill. They won't have a copy to send the second month and need to recognize the need to reimburse two months. Installation is considerably more expensive than what is covered. **Benkelman** said they looked at averages of all the phone companies in Montana and tried to arrive at something that was consistent and reasonable. They knew it did not cover the cost of that installation. **J. Lane** asked how long it takes to enter someone into the system. **Mulligan** said 10-20 minutes, but improves over time. If they get the phone connections resolved, it will be as fast as the paper copy. A problem right now is when mistake is made they must start over. **J. Lane** asked how long it will take once that background information is in the system. **Benkelman** said once information is in system, experienced clerks can do it in 15-20 seconds. Commissioner Mulligan has a good idea for when those crunch dates come around we need to have a lot of plans for flexibility and alternative options. We need to be able to get devices into the larger agents to handle that crunch time, i.e., get the device in for a month and then take it out. That must take into account logistical problems of available phone lines. Another date to look at is opening of fishing season where everyone will be challenged. **Mulligan** asked if there are problems when they do reconciliation and sweeps of the accounts. **Benkelman** said they have identified a few, but none that are major. **Walker** suggested when the department gets close to the application deadlines and crunch dates that the Commissioners be provided with the contingency plan. He said his concern is for those who wait until the last minute during the crunch times. **Benkelman** said they can provide a contingency plan. **Mulligan** said he struggles with the same concerns of how to accommodate people without encouraging them to wait until the last minute. Need to look for latitude there. **Benkelman** said their outreach efforts strongly encourage people not to wait until the last minute. **Walker** asked if there is a device on the multiple machines to put more than one machine on a private line. **Benkelman** said he doesn't know of anything that allows them to split different ALS devices and still conduct activity with all devices at the same time. Looking at using DSL and high-speed lines but there is a higher cost involved. Hoping that maintaining the connection once it is established and not having the 40-second delay will be a big change for those using the public switch network.

10. Lewis and Clark Interpretive Center, Region 4 - Final. Paul Sihler, Field Services Division Administrator **-** Request for final action and approval on a three-way land exchange between the department, the U.S. Forest Service and the Beckman Estate. Also asking for approval of a one-year option agreement whereby additional land could be acquired for the shooting range component of the department's acquisition if additional funds become available. The state of Montana began discussions with the U.S. Forest Service 10-15 years ago regarding the acquisition of department-owned land and the development of the Lewis and Clark Interpretive Center in Great Falls. The Interpretive Center has been built on land owned by FWP and leased by FWP to the Forest Service. With the Forest Service investment, they,

understandably, would like to retain fee title ownership of the land on which the facility sits. In the historical record from some time ago, there was a gentleman's understanding between the state and the federal government that that would happen. We are finally here today consummating this agreement.

This is a three-way agreement, which is that the department will exchange to the Forest Service 27 acres of land we own at Giant Springs State Park that has an appraised value of $210,000. The Forest Service will purchase 600 acres of the 942 acres of land available from the Beckman Estate for a shooting range for the department. The Forest Service will then turn over that Beckman Estate land to the department for the shooting range. The 600 acres of Beckman land has been appraised at $235,000. The city of Great Falls will contribute $25,000 towards acquisition of the Beckman property so the values are equalized. We would then have a one-year option agreement to purchase the remaining 342 acres with a yet-to-be-determined funding source. Want to obtain some buffer lands by the shooting range. Revenue the Beckman Estate gets from selling this property to the Forest Service will be turned around and put into mule deer habitat acquisition as part of the final will and testament of Mr. Beckman. Have a long-standing relationship with the Beckman Estate using those funds for the established purpose of mule deer habitat acquisition.

With regard to the specific decisions being made here on the three-way exchange, the department sent out a draft EA on November 11, 2001. Received eight letters of support and one in opposition. A decision notice was issued on December 14, 2001 by the Region 4 supervisor approving the project, and bringing it before the Commission today. Should the Commission approve this project, it would also require land board approval because of the values.

There is an existing agricultural lease on the property. Department will maintain that lease that is not directly part of the shooting range. The shooting range is a community-initiated project, and there has been an identified need in the Great Falls area for it. Department will not operate the shooting range, but will own the land and have an arrangement with a consortium of local shooting groups who will develop and operate it. Capital development of that site is not part of this proposal. A hazardous materials study was done at the site. No significant issues were identified except for a lot of debris like an old boxcar and other things on the site. The shooting clubs have access to the property to remove that before the transaction is closed.

One comment in opposition to this project came from an owner of a private shooting range, Mr. Lapelle. His concern was the government was creating a shooting range that would compete with his facility. Department perspective is this is something the community has advanced that we are helping facilitate. It is 21 miles from Great Falls to Mr. Lapelle's shooting range. There may be some competition, but there is overwhelming support from the community for this. As far as the community is concerned, Mr. Lapelle's range is not meeting the needs of the community.

Mulligan asked if the department could contractually transfer liability to the groups operating the site. **Sihler** said the department has four or five other shooting ranges with these sorts of arrangements and he assumes there will be some shared liability. **Martha Williams**, FWP Legal

Counsel, said the standard indemnity language they have is we are responsible for our actions and they are responsible for theirs. **Sihler** said he doesn't think we can get rid of our liability but there is probably some shared liability with a contractual arrangement. **Commissioner Murphy** asked who would be responsible for weed control, fencing, etc. **Sihler** said under the lease agreement with the agricultural landowner, the landowner will assume responsibility for weed management on those lands. On the shooting range it would be addressed in the management agreement with the shooting clubs.

Mike Aderhold, Region 4 Supervisor, said they haven't answered all questions on operation of shooting range. Said their approach has been to get the land first and then talk about what happens next. It is a valuable piece of property and the department can't lose in holding that ground. Want to dedicate it as a shooting range for all of the shooting sports. They have support from area enforcement, the city of Great Falls and Cascade County. Weed control will be our responsibility and they currently contract with Cascade County for all of their weed control in that county. The farmer in the area has a new lease on the site for agriculture. They have a good reputation for staying on top of weed control.

Walker asked about weed control in the waste area and annual cost of that. **Aderhold** said he didn't know. They have a contract on weed control for about $9,000 for fishing access sites and park lands. **Walker** asked if there is any provision for shooting groups to participate in that. **Aderhold** said they will hold public meetings after they get this ground and will invite representatives of three successful shooting organizations. Then they will approach the idea of a board of directors with representatives from all the shooting interests and the city and the county. Then they will look at setting up a small working group representing a larger constituency to look at these issues to develop a management plan for operation of this shooting range. **Sihler** said with a contractual arrangement with the sporting clubs he didn't see any reason some of the cost of that burden couldn't be placed on them. Because Mike Aderhold hasn't started that process yet, he is not in a position now to say that will be the result.

J. Lane asked if entering into a lease agreement, were they forcing the general public to join these organizations in order to use the shooting range? **Aderhold** said the whole idea is to enhance the shooting culture in Great Falls. There presently is no place in the area where the public can sight in a weapon unless they are members of a shooting organization. They need a place for public shooting opportunity like 4-H groups, scout groups and our own hunter education program. There are operations like this in Billings, Missoula and Hamilton where it seems to work fairly well. The department has an interest in them, but the actual operation is by shooting groups. **Walker** said he has been involved with different shooting clubs for a number of years. An area of shooting he is not proud of has to do with shooting clubs and weed control. He is interested in binding the shooting clubs to successful weed control. It has to be in the shooting clubs' interests to pay attention to weed control and this is a good opportunity to deal with that. Weed control, especially with knapweed and spurge, is costly. **Sihler** suggested, in addition to the motion, asking the department to negotiate that component of an agreement with the shooting clubs. **Walker** said he wants participation by the shooting clubs. The kind of ground that is used is fertile ground for weeds.

Murphy asked if there were similar leases where the department has ownership of the land. **Sihler** said, yes, there are four or five of them. **Aderhold** mentioned Missoula, Hamilton, and Havre. A percentage of Pittman-Robertson funds are earmarked for shooting sports. That is the reason shooters came to them five years ago asking for help finding some ground. They looked at different properties and it wasn't until Mr. Beckman passed away, they saw the nature of his will, and this started coming together with the Lewis and Clark Interpretive Center. **Mulligan** asked if an EA needs to be done to put a shooting facility in place; right now it is just a land deal. **Sihler** said, yes. They are acquiring the land now and need to develop a lease agreement and management plan. Presumably, there will also be some sort of capital development. An EA will be part of that process and a lot of the details will be addressed through the public process. **Murphy** asked if the EA might identify reasons why a shooting range would not be appropriate for that area. **Sihler** said that is what they did in this process with the acquisition. They have been clear about the fact this is being purchased as a shooting range. They selected a site that has the qualities and characteristics to make it suitable for shooting. **Aderhold** said the original EA mentioned the intended use. **Sihler** said they also had letters from the city and the county indicating their support. The community knows what is going on and is supportive.

Jim Panagopoulos, Missouri River Shooters Assoc. - They support this. They are looking at putting in a 1,000-yard range here. There is enough ground to do that. There are two 1000-yard ranges in the state. One is in Whitefish and the other in Missoula. It is difficult for those in eastern Montana to make the trek to shoot in those 1,000-yard matches. One in Great Falls would be centrally located and a good enhancement for shooting sports.

Bill Summers, Missouri River Shooters Assoc. - Here to support the range. He has an agriculture background and understands the concerns. Does not see why the lease couldn't have weed control in there for whatever group is using the land. This is something needed up there. Shooting sports are growing and they have a need for it.

Larry Copenhaver, Montana Wildlife Federation - Today representing Russell Country Sportsmen of Great Falls. Was a resident of Great Falls from 1980 to 1985. There was almost no opportunity for the common hunter to even go out and sight his rifle. Respect the shooting sports organizations and see that they can also use this facility. Russell Country Sportsmen are 100% behind this project and commend the department for pursuing this for as long a period of time as they did. The only place a negative could possibly come from would be anti-gun folks. Scattered, indiscriminate shooting ranges which people have been using or trying to come up with a place to sight in their rifles over the years would be fuel for their fire. This should defuse those kinds of complaints by showing responsibility. Again, they stand 100% behind this project and hope it goes forward.

***ACTION: J. Lane** moved approval of this three-way land exchange between the Forest Service, the Beckman Estate and FWP as proposed. In addition, move the Commission to further approve the one-year option agreement for acquisition of additional lands for the shooting range if funding from other sources becomes available in the future. **Walker** seconded. **Motion passed**.*

11. Bice/Hirsch Conservation Easement, Region 7 - Final. Paul Sihler - We bring before you a request for final action on the Bice and Hirsch conservation easements, two separate easements that we have treated as a single project. The two proposed easements are located in Custer County about 30 miles south of Miles City along the Tongue River. The proposal is for the department to acquire an easement on approximately 12,694 acres on the Bice ranch and a 2,680-acre easement on a portion of the Les and Donna Hirsch ranch. The cost of the Bice easement is $1,217,842 and the cost of the Hirsch easement is $134,172. The source of that funding is the Habitat Montana program.

The easements have fairly standard terms. The landowner retains the following rights:

Pasture and graze livestock;

Regulate public use subject to the hunting access provisions;

Maintain and develop water resources necessary for grazing, wildlife, agriculture and domestic purposes;

Repair and renovate existing residential structures;

Construct two additional single-family residences;

Cultivate existing irrigated ground and dryland hay and grain fields;

Use agri-chemicals for weed control;

Use motor vehicles and agriculture equipment in their ordinary business.

The department gets the rights to:

Identify, preserve and protect wildlife habitat in perpetuity;

On prior notice enter the land to monitor compliance with the easement and enforce the restrictions of the easement;

Prevent any activity or use that is inconsistent with the easement;

Access, on behalf of the general public, for the purposes of recreational hunting on the Bice conservation easement, which is 615 hunters with 2,000 hunter days, and on the Hirsch easement, which is 50 hunters with 150 hunter days.

Restrictions include: control and manipulation of sagebrush, draining and reclamation of wetland or riparian areas, legal or de facto subdivision. Landowners are required to use their best efforts to assure the retention of any and all water rights. Removal of trees is prohibited, control and manipulation of vegetation is prohibited, as is the leasing of the land to others for hunting or fishing. The landowner will maintain a viable prairie dog colony on at least 230 acres of the land.

Other restrictions are: installation of utility structures; exploration for development and abstraction of minerals, coal, bentonite, hydrocarbon soils or other minerals or materials by any surface mining method; establishment of a new feedlot (there is now a feedlot; it can be relocated but not expanded in size.) The use of the land for an alternative livestock operation or other commercial wildlife operation is prohibited. Commercial or industrial use on the property are prohibited; as are the processing, dumping, storage of disposable wastes, and disposal of wastes, refuse or debris.

Those are the terms of the easement. John Ensign will talk about the values of the property and the location. I will talk about the processes we have been through on these easements, which have been fairly extensive, and then John will address the issues identified through the environmental review process.

John Ensign, Region 7 Wildlife Manager - This property in Custer County is about 30 miles south of Miles City and is located within the Tongue River drainage. The department was approached several years ago by the Bice ranch about the potential for a conservation easement on their property. In the interim the Bice and Hirsch ranches jointly purchased some property that lies between them. We decided to include that also. One easement is about 12,694 acres under control of the Bice ranch and the other easement is about 2,680 acres under control of the Hirsch ranch. There is a piece of state land within this easement and about 4½ sections of BLM land. These lands are included in the property but not part of the easement.

The major focus of this conservation and land stewardship project is to protect threatened habitats, especially riparian areas and sagebrush grasslands. From a statewide and eco-region perspective, these two habitats are considered critical wildlife habitat in need of conservation. A third habitat type is prairie forest. About 40% of the riparian habitat is under cultivation and irrigated crop. The interspersion of these three habitat types on the property makes it a highly productive and diverse wildlife area. It supports year around habitat for mule deer, whitetailed deer, antelope, sage grouse, sharptailed grouse and pheasants. Seasonal habitat is found for a wide array of other species such as raptors, small mammals, waterfowl and a variety of neo-tropical migrants or songbirds.

Sihler - Had extensive public review and public comment on this easement. The public initially identified a series of concerns. The department did more than it usually does in a review process as a result of those concerns. The initial EA and project proposal were put out from July 23 through August 24, 2001. There were 115 copies of the draft EA distributed to the adjacent landowners, environmental and sportsmen's groups, state library, Custer Co. Commissioners, and other interested parties. Also held a public meeting on August 15, and about 29 people attended that hearing. John Ensign also met with the Custer Co. Commissioners. There was no opposition from that commission through the written comments and the public meeting. There were 21 people who commented on the project. Of those, four favored it and nine were opposed. A variety of issues and comments were raised. Looking at those issues and comments, the department decided the current EA was not adequate and to address more things. The department spent last fall working through those issues in developing a revised draft of the EA, and the revised EA went out for public comment on January 30, 2002. Had comments from 10 individuals or organizations; 6 were in favor, 2 were opposed and 2 raised some questions. John Ensign again met with the Custer Co. Commissioners and there was no opposition the second time around from that commission.

Ensign - I will highlight some of the bigger issues from those that came up: One of the first revolved around mineral rights and the effects of this easement on separated or severed minerals. FWP gains no mineral rights in this project. The easement restricts the surface landowner. It does not limit, restrict or impair the separated mineral interests. Those separated mineral

interests can still be explored and extracted. The mineral estate is dominant over the surface estate. It is the department's impression that the presence or absence of this easement really does not have much bearing on that mineral value. That mineral value will be set by the market and the economics of extraction.

Tied into minerals, questions have come up centered around coal-bed methane development and what effect coal-bed methane development will have on the easement should it come to pass. There is a potential for coal-bed methane development. At this point, it looks pretty minimal. If coal-bed methane development is feasible there, the easement cannot stop it. It is the department's impression if coal-bed methane development does occur, the easement can still exist with responsible development. What is more troublesome with this coal-bed methane development is related to water quality. It would affect this property and properties up and down the Tongue basin.

Also tied into this are questions related to the Tongue River Railroad and the affect that will have on the easement. There is an alignment set up that goes through all of these easement properties. The potential for this railroad development is there, and the easement cannot stop development of the railroad. It the railroad goes through, they must mitigate the impacts of their right-of-way on the land, which includes this easement property. If this easement goes through, the department would be actively involved in trying to mitigate impacts of this right-of-way.

Other statements were made that placing an easement on this property would devalue that property value by 50%. There were fears that devaluation would spill over onto neighboring properties. People felt this would then be a "taking" of their property. The department compared land values adjacent to the present easements, and looked at land values of similar properties more than 30 miles distant. We found very little difference in land sale values between properties close to the easement and distant from the easement.

Questions have come up related to irrigation on the project, and whether irrigated acres will be maintained or if they will be lost. This centers around an agreement with DNRC that the SH dam and diversion must be closed at the end of this year. That is where this ranch gets its water now. That agreement is in effect, but the agreement only covers the dam and the headgate, which must be closed by December 31, 2002. The agreement does not preclude the utilization of the rest of the ditch. The landowner himself owns the ditch so he can still use that ditch to water the place. He can use another method of diversion to pull water out of the Tongue River and put into the ditch, which he plans to do. The landowner has drawn up a plan for conversion from flood irrigation to center pivot and wheel line irrigation. He has converted 110 acres to center pivot and 118 acres to wheel line. The plan calls for an additional 985 acres of center pivot irrigation and an additional 140 acres of wheel line. These will be put in place over the next several years. He has applied for eight different points of diversion along the Tongue River. The plan is to pump out of the river to irrigate. The easement stipulates that the landowner use his best efforts to retain water rights necessary to preserve, protect and conserve the conservation values of the land, and that he not allow those rights to be lost or abandoned.

Questions have also come up about the feedlot. There is a feedlot of about 50 acres on the property where he backgrounds and feeds neighborhood cattle. Questions about it meeting regulatory specifications have come up. The landowner has been working with those regulatory and responsible agencies to bring that feedlot into compliance. The feedlot at that current location will have to meet or exceed minimal standards. If it does not, there are options within the easement to move that feedlot. If the landowner does move the feedlot, it would still have to meet those minimum federal requirements.

Questions have come up related to the cost of this easement. After the questions came up, the department went back and re-evaluated and adjusted land values used to determine the value of the easement. A major portion of the cost of this easement is derived from the value of the irrigated land. The response to the question about this being a wise use of department money is that within Habitat Montana, riparian areas are one of three critical habitats in the state we are really interested in conserving. With that in mind, these prime areas typically have irrigation tied into them. The question comes down to is that something the department is really serious about doing, which is conserving riparian areas. If we are, it will cost. Conservation is not cheap. Another part to that is this riparian area is an integral part of the easement. If we separated out the irrigated bottoms in the riparian area, we lose the integrity of this easement. That riparian bottom and the agriculture there is of very high value for a number of species on the property.

Questions also came up related to the hunter number figures stated in the easement. Folks said the 650 figure was unrealistic, it would be too much pressure on the deer, we would wipe out the deer and we would have no quality hunting left. There are three wrong assumptions with these statements. One is there will be 650 hunters out there every year, and year after year. Another assumption is that all 650 of these hunters will be deer hunters. A further wrong assumption is that all the deer hunters will be interested only in trophy deer. The 650 level set in the easement gives flexibility to allow adequate hunter access to control game damage and prevent habitat destruction by big game animals when numbers become excessive. The primary focus of this easement is on the conservation of habitats, and game management is an integral part of that habitat management. If we allowed deer populations to exceed the capacity of the land to support them and they degraded the habitat, we would be in violation of our own easement. The place probably supports 250-350 hunters a year. About 30% of those hunters are bird hunters, 10% are antelope hunters, and 60% are deer hunters. This past year 44% were bird hunters, 44% were deer hunters and 12% were antelope hunters. It will vary somewhat, but it is a fairly good mix. Typically on these properties we're looking at 25-50% of the harvest being an antlerless harvest. The current agreement lists a maximum of four parties per day on the property, regardless of what they are.

Tied into this, neighbors have raised questions about increase in trespass, poaching and game violations. Concerns were raised that the current easement properties were inadequately signed. There were also comments that Fish, Wildlife & Parks does not respond to complaints. These complaints are taken seriously. This past year we hired a technician to help manage hunting on these block management areas, and we will continue to do this. The responsibility of the technician is to learn the boundaries, put up signs and make sure properties were adequately signed, maintain landowner contact, provide assistance to landowners, both block management

and non-block management, contact hunters and provide assistance to them, patrol the properties and maintain contact with the warden. Enforcement took this seriously and feels they have done an adequate job of responding to complaints. Law enforcement ran 11 patrols this year in that Tongue River area, had check stations there, a decoy operation, and received and responded to 5 trespass complaints in the area. Of the five complaints, only one citation was issued. Two complaints were against hunters who were legitimately hunting on BLM land. One complaint was about hunters who crossed corner to corner on two BLM pieces, which is illegal, but the county attorney would not prosecute that case.

Sihler - The department requests final approval for acquisition of the Hirsch conservation easement, which is 2,680 acres for $134,172, and a motion for acquisition of the Bice easement, which is 12,694 acres for $1,217,842. He then introduced the landowners who were present, Mr. Don Bice and Mr. Les Hirsch. He also introduced Mr. Cal Christian, trustee with the Hensler Charitable Trust that is a partner in this project.

J. Lane asked about the new points of diversion. He understands permits have been applied for. How far along is that process and do we know for sure those points of diversion will be acquired?

Cal Christian - The canal and diversion point is an old concrete dam that ran completely across the Tongue River and is creating some problems. The dam is in disrepair. In an agreement on the canal with the Department of Natural Resources, the Bice ranch agreed to close the diversion. The options then are to either locate a pumping facility to pump into the canal or to locate pumping stations near to the pivots. They have applied for a change of place of diversion from where the Tongue River entered the canal to various places along the Tongue River to support additional irrigation and pivot activity. With the Department of Natural Resources agreeing to the closure and paying for closure of the canal, I can't imagine a problem granting alternative diversion points. The purpose was not to do away with the water rights. The purpose was to close that diversion and get rid of a major problem for DNRC. The alternative places of diversion will be approved. The assurance is that the landowner, by agreeing to close the canal, would no longer have that point of diversion and he could then move the place of diversion. If for some reason DNRC does not let him move, in my opinion there is a serious question as to the validity of closing the diversion. **Sihler** said Darlene Edge, FWP Field Services Land Agent, has talked with DNRC. They are processing this change in diversion. They are a couple of months out in doing it as far as workload. They have indicated to her they don't see a problem with that. The final processing is just not completed at this point.

Walker - Has a question related to a letter from Paul Hartman and a discussion from page 16. You spoke to this point, but it is still not clear. The comment was, do mineral rights remain with landowners or does FWP gain mineral rights? What affect does the easement have on mineral rights that are separate from surface and how will the easement affect the value of these separated rights? The response is: "In this project, the department did not acquire any mineral rights; however, the conservation easement prohibits surface mining of minerals, coal, bentonite, hydrocarbon soil and other materials." The Hartman letter asks that question. In one case it says

the department can prohibit the mining and in another area it seems as though the department cannot. Which is it?

Martha Williams, FWP Legal Counsel - We would not acquire any mineral interests with this conservation easement. However, the terms of the easement that address minerals would prohibit any surface disturbance or surface mining, and any subsurface mining that would have a significant impact on the conservation values. It is only able to prohibit the development of minerals owned by the landowner because this is an agreement between us and the landowner. It does not affect those minerals that have been severed and that are owned by a third party.

Walker - Would that situation then block the development of minerals due to the interspersed nature of ownership? **Williams** said the conservation easement would not block the development of minerals owned by someone other than Mr. Bice and Mr. Hirsch. It does restrict the development of the minerals owned by Mr. Bice and Mr. Hirsch, but it does allow the development of subsurface minerals as long as they submit a plan to the department, the department approves that plan and has the ability to comment on the mitigation and make sure there are no impacts to the conservation values. It restricts the development of minerals owned by the landowners, but it does not restrict the development of minerals owned by a third party. **Walker** - I have not seen a map of the minerals. Typically, if you were going to mine coal, for instance, there is a piece of ground in the middle of a developable area and you can't get at it, in effect you have stopped all development. **Williams** said that if she understood the question correctly, the third party that owned that portion does have the right to reasonable access to get at that. We cannot restrict that. Practically speaking, if the landowner's minerals were involved in that, we would not restrict that. We are restricting the ability of the landowner to develop his or her minerals, but where a third party is developing minerals and somehow the landowner's minerals are implicated, as long as there is no additional impact we wouldn't stop that.

Cal Christian - I think, Mr. Chairman, what you are asking is, from a practical standpoint, will there be mineral development and not the legalistic idea of who owns the minerals. There are two ways the minerals can be split out. They can be split out by section or quarter section, and someone owns 100% of those sections, or there can be an undivided mineral interest owned like one-half by a previous landowner, one-half by the Bices, one-half by the Hirschs. There are really two things: whether there is isolated land in there where someone owns 100% of them and I don't think that is the case. I think in all cases, these are undivided interests. From a development standpoint and I think that is what worries Mr. Hartman, for a company to come in and mine, they will want everyone signed off on those minerals. Our landowners cannot sign off on them. The owner of the other half can sign off. If you are a mining company, you want to develop a methane gas field and you can't get half of the mineral owners to sign, you have one of about three things. You can go ahead and mine it with half interest, you can negotiate with the other half interest which says it has to be done in a reasonable manner and protecting the conservation easement which I hope will happen, or you can abandon the project. Those are your three practical applications.

Murphy - Did I hear it right that on the other part of that mineral situation the department could object based on the potential impact on that conservation easement? Specific to that and in this

particular area where we're looking at sage grouse and prairie dog colonies to be maintained, would those kinds of things be enough of an issue that the department would object and jeopardize the other mineral rights associated with those properties? **Williams** said the department only has the ability to the point that the development would significantly impact the conservation values. We would have to go through a typical EIS analysis and determination of significance of impacts. We would need to show that the impacts would be significant. If the impacts were significant, then, yes, we would limit the landowner's ability to develop those, but not the third party's rights. Then you get into the issues that Cal Christian was talking about and the practicality of the third party being able to develop those minerals. **Sihler** said he thought the other issue was, what are the minerals likely to be developed? The mineral potential does not seem to be any surface mining. The mineral potential seems to be oil and gas or coal-bed methane. The coal-bed methane potential, in my opinion, is pretty low right now having met with DNRC and gone over the Montana Bureau of Mines and Geology's coal-bed methane development map. It is all to the south. There is a very thin ridge of coal further west off of the easement where there is not current technology to develop. I couldn't see any development potential that Montana Bureau of Mines and Geology has identified as existing on the easement. The landowners and mining companies may know something different, but I think the potential is low there. If there is development, the minerals they are after are subsurface. The issue is more likely to be roads and minor surface developments where the department would be looking for ways to mitigate around them. We don't have any indication of significant surface potential.

Williams said there is the additional issue with IRS regulations where for a landowner to get any positive tax treatment from a bargain sale or donation of a conservation easement they must then restrict mineral development in perpetuity. There are IRS regulations outside of the terms of the easement that limit a landowner's ability to develop minerals. I have not talked to the landowners about that, I am not counseling them, but I know they are aware of it. **Walker** asked what the effect would be on this easement to remove that language. Understanding that today we think the potential is low, it seems to be going beyond what we are after given any development in the future. We don't know what the future will hold. The idea of precluding that seems a bit foreign. What is the effect today of removing this prohibition? **Williams** said the effects would be twofold. One would be the department's ability to comment and prohibit the development that would significantly impact the conservation values for which we acquired this easement. It would remove our ability to say no. **Walker** asked if we would have standing being the owner of this conservation easement. **Williams** said we would always have standing, but we wouldn't have specific terms to enforce, to say what the landowner may or may not do. Without this provision, we don't have a mechanism in the easement document to point to and say, "You're prohibited from doing this because it affects the conservation values." **Walker** asked if there was another way to get the standing you wish to have without having the black and white term "prohibited." **Williams** said, "yes." We will always have standing because of being a party to this conservation easement. In fact, we have the responsibility to enforce it. We could reword this paragraph to allow us to comment and ask for any mitigation, but that would not allow us to prohibit an activity regarding mining that has a significant impact on the habitat. **Sihler** said the other impacts would be on the value and probably a procedural impact on your decision today. I think we have to withdraw this from a decision today and come back and make some changes. I don't know if there is any additional public review that would be triggered in changing those

terms. We have not been in this situation before and advise that you not make a decision. We'd have to go back and assess from a procedural standpoint how we need to proceed to get you to the next decision.

Walker said with the awarding of damages when there is development of minerals it is designed to take care of these sorts of things. Why would we insert a provision that could have a negative effect on someone else's ownership of minerals? **Williams** responded that every conservation easement we have held and every other conservation easement she has seen that other entities hold do limit the ability for mineral extraction, primarily because the landowners are interested in some sort of preferential tax treatment, whether from selling the easement for less than its fair market value to the entity that is acquiring it or by donating it. When they do that, the IRS regulations require this limitation. This is not unusual in that normally there are tax consequences to these transactions. It's just the way it has been done. I'm not saying we can't do it differently, but it is not unusual. This is what we have always had in our standard conservation easement forms, partially because of the tax consequences. **Sihler** said you might have to ask the landowners whether they anticipate getting any tax benefits as a result of this easement.

Cal Christian - They don't get benefits because it is a purchased easement. They did talk with Darlene Edge about the fact the original appraisals on this ranch date back to 1995 and there has been an increased value. They talked about an after-the-fact appraisal that would be more value that the landowners have agreed to turn around and donate to Fish, Wildlife & Parks. To the extent that that would be less, I don't think that's a concern to either Mr. Hirsch or Mr. Bice. If the Commission wants to change the restriction on mining to something more palatable with the other mineral owners, they would not object to that. They are willing to go along with the Commission on what they decide. They are fine with it just being left alone, but he wouldn't let the tax tail wag the dog on this. **Commissioner Mulligan** said what he hears being asked is they don't want to limit the current owners or future owners of the property in their mineral exploration and development. His experience on the Commission is that is totally contrary to the basis they have gone on. They have always limited the person who owns the property in their mineral development if it could impact the conservation easement values. They have explicitly identified that in the documents. He said he would be very hesitant to take that out. If the concern is limiting or impacting the other mineral rights owners who are not the property rights owners (believe the word is "severed"), doesn't think anything written in this easement is going to affect those laws. They will take precedence over this easement. **Sihler** said that was correct. **Walker** said it is his understanding that with a project such as coal, if a person can't put together a project to include all of the coal, then it is uneconomical. By artificially not allowing development under a piece of a structure, then it is not economical to mine any of it. Is that what we want to do? **Mulligan** said he would be greatly hesitant to approve an easement where they did not limit that mineral exploration by the owners. He said he is not sure they would be meeting the intent of the habitat program if they did that.

Paul Sihler - Not sure there is coal surface development potential here. From a policy perspective, we do have standing with the easement, but we are making a $1.2 million investment here. We want terms in the easement that will provide clarity to us and the landowner that will ensure our ability to protect our investment. In addition to the tax purposes,

the other reason those terms have been there is to ensure the department has the ability, clearly and specifically via the terms of the easement, to affect the mineral development of the landowner we are dealing with, and to be able to comment on the mitigation measures and the impacts that would happen. A component of this is trying to protect the investment we're making and ensure we have the ability to do that. **Commissioner Murphy** said with an undivided interest, assuming that is the way mineral rights are established on that property, he has a hard time envisioning when you restrict whatever percentage the property owners may hold, how does it not impact the remaining rights? How do you determine whose 50% it is with those mineral rights when it is an undivided interest? **Sihler** said Cal Christian laid out the options. The department has not faced this situation before so doesn't have any history to go back on. The owner of a severed mineral interest has the right to develop that mineral right, and we have to address the impacts of that mineral right to the landowner and presumably to the department. If the mineral right being developed in this instance is coal-bed methane, the surface impacts are fairly minimal. If the severed mineral right owner is developing those mineral interests, and we can't differentiate between which minerals the Hirsches or the Bices own from the interests the severed owner has, from the department's perspective we don't have any basis for a problem with the Bices or the Hirsches taking advantage of their share of that mineral development. The impacts are already there from the severed mineral interest owner developing his mineral right. There is no additional impact. The roads are in place and whatever development is already in place. From our perspective, the benefit accruing to the landowner is not a problem there when there is no additional impact. **Christian** pointed out that at best the landowners have 25% or less. The severed mineral owner will have to deal with the 25%. Thinks the way the easement is written is perfect because it makes them sit down with the owner of the land that is restricted by the easement, get hold of Fish and Game and decide how it's going to be developed. Doesn't think it will impede the development.

Paul Hartman, Miles City, Montana - Feel this definitely does restrict the development of minerals and there is methane gas under the property. Whether it is commercial or not, we don't know yet, but are in the process of looking at it. Here to protect his property. Even though Don, Lance and he are not partners in the surface, they are partners under the ground because the minerals are owned undivided. Can refer to them as separate minerals, but they are not. They are together, undivided interest. Another way this can affect the development is if the cost of development as a result of the conservation easement and wildlife enhancement increases the cost of developing the minerals. Of course then the developer will go away. It will be too high. Need to stop and do some real serious thought on this before going any further.

Don Bice - We as surface owners and you as a department cannot stop a mineral owner from coming and getting their minerals. That is federal law with right of ingress and egress. The federal government owns most of the coal and there are numerous cases out there where surface owners have tried to stop the federal government, which owns a tremendous amount of the mineral rights in eastern Montana and all the oil development areas. I am familiar with oil development because I came out of an oil development area in North Dakota. My interpretation of the easement is just like Tongue River Railroad. The easement cannot stop Tongue River Railroad. I wish it could. The department will receive approximately 45% of the surface damages because it is damaging their original conservation easement. We cannot stop mineral

development and we cannot stop Tongue River Railroad. Your mineral rights are so valuable, they will come in even if I don't sign and put my money in escrow. The mineral owner has that right to do it and I don't have to sign. It has happened before. North Dakota is full of oil and gas development on federal lands and they had to deal with the federal agencies, which are a lot harder to deal with than most local agencies.

Paul Sihler - Maybe it would be useful to look at the specific language of the provision, the term in the easement that this addresses. It's page 8 of the Bice easement where the mineral term is, under "Restrictions," and then go to #10. The first sentence in this paragraph deals with surface mining and I will skip that because what is relevant here is the subsurface. Look at the second sentence where it says, "In addition, the exploration for development and extraction of minerals, coal, bentonite, hydrocarbon soils or other materials below the surface of the land by any method that would significantly impair or interfere with the conservation values of the land is prohibited." So it's not all development that is prohibited, it's the development that would impair those values. You then go on to the rest of the term and it describes the process and what has to happen if the landowner is going to develop these minerals. Prior to engaging or explore, they must seek approval from the department and submit a plan, address issues about locating facilities so they are compatible with the existing landscape and wildlife, restore any altered natural features of the land to the original state, and comply with the legal requirements. Determining whether there will be a significant impact is based on the significance criteria established in the MEPA rules. So there can be development, but development by the landowner must be done in a way that doesn't have a significant impact on the conservation values. In the instance of the severed mineral right landowner who wants to develop his property, there is a way here. Making the assumptions that we've made about minimal impacts on the surface, that owner of the mineral right with the surface landowner who sold us the conservation easement can develop those minerals as long as it is in a way that doesn't create a significant impact.

Murphy - If it does appear there would be a significant impact, is the owner then responsible for trying to prevent any development from happening from the standpoint of the other 75% of the ownership? **Sihler** responded that the owner doesn't have any legal basis for doing that because the mineral estate is dominant to the surface estate. **Christian** said we are assuming that the guy who owns the surface and the mineral interests will want to develop minerals. Don Bice, whether you put in this easement or not, can go to Mr. Hartman and say, "I'm not signing any leases." He has the same problem: developing his mineral interests without the benefit of Mr. Bice or Mr. Hirsch. It doesn't affect that. I would submit to the board that once Mr. Hartman decides to mine his regardless, it's going to be very difficult for the department to suggest there is a real impact on the land. It's going to be done anyway. I really like the way it is presented in the easement. I think it works very well to protect fish and wildlife interests, and allows the development. **Hartman** asked if minerals were going to be developed, what constitutes an insignificant or minimal impact? That's not spelled out very clearly. **Christian** responded, "That's not your issue. That's Mr. Bice and Mr. Hirsch's issue. You can do what you want within the laws of mining and practice mineral development." **Hartman** then said that if an operator can't get 100%, no operator will come in there and develop the field. **J. Lane** asked about #10 where it says "landowner seek prior approval," shouldn't that be the mineral right holder seeks prior approval? **Sihler** responded that their agreement in the conservation easement

affects the surface owner. We don't have any relationship with Mr. Hartman. Nothing in the easement affects Mr. Hartman; it all affects Mr. Bice and Mr. Hirsch. **Walker** asked if that then means Mr. Bice could sell what minerals he has to someone else. **Mulligan** said he tried to find that in there and couldn't find anything about their inability to sell. **Williams** responded that severance of the minerals by the landowner is not in here specifically. As the landowner he is subject to the terms and may not subdivide a unit of land. It is something that has just come up with this letter and is not something put in specifically in the terms. It can be put in to be explicit. It is not something we have done yet for this. It is just in general that the landowner is subject to the terms and must follow the provisions on mineral extraction. But it does not specifically say, "He may not." **Christian** said he thinks it does say that. Usually the landowner cannot develop except in a certain way. That's a direct prohibition. He cannot indirectly get around that by selling to somebody else and letting them do it. I don't believe that. **Williams** said that is certainly the intent of the document.

Darlene Edge said placing this easement on the land, any right, title and interest he has to that land would go under the easement. **Christian** said he can't sever those mineral interests and sell them, and indirectly do what he is prohibited from doing. **Williams** said once this is recorded, any of the interests in land that the landowner owns and then divides would be subject to the terms of this. So were he to sell the minerals, the new owner would have to comply with the terms. **Hartman** said they might possibly be interested in leasing the surface owner's minerals prior to the easement going on record. **Walker** said that changed the value. **Mulligan** said you'd have to start over. **Christian** said they're not going to do that. **Edge** said she ordered a mineral search on Bice and Hirsch properties and is not sure how much Paul Hartman has, but this has been severed, and re-severed and re-severed into $1/7^{th}$s and 1/10ths and $1/100^{th}$ of $1/14^{th}$, etc. So probably talking about a very minimal impact, even if Paul did go out there and do what he wants to do. There are a lot of other mineral interests on this land. **Walker** said that was his original issue. His understanding in developing a project is one has to assemble all of these interests. So one could go about that assembly and find an easement that stops the project, maybe for a reason we don't anticipate.

Christian - In answer to your question, what Mr. Bice and Mr. Hirsch are saying is if this easement is approved, they're not giving permission to mine. They can do it by selling their mineral interest to somebody else. It's theirs to dispose of. They are disposing it to you. They are saying from this day forward, we're not going to mine our percent of this interest other than under the regulations of the state. It is theirs to give away or to keep. They are telling Mr. Hartman, "We're not selling you our minerals. We're selling them to the state." The Bices and the Hirsches are making a decision that they don't care about development of our minerals. They are not going to transfer them, they are not going to lease them. They are committing them to the state by way of an easement and they have a right to do that. **Murphy** said if development happened in the future and they owned 25%, there was a comment about part of the proceeds going into an escrow account associated with the landowner's percentage. What happens with those dollars? **Williams** said money going into an escrow account would only occur if the landowner did somehow convey their minerals to a person that has the ability to develop them. If they convey them to the department, then there would not be that money going into an escrow account because their undivided portion of the minerals would not be extracted. If this were to

go forward the way it is worded now, there would not be the issue of money going into an escrow account.

Bice - The purpose of putting into an escrow account is to keep a very minor mineral owner from holding up the whole development. His money is put into an escrow account and if he doesn't want it, it stays there forever. If he does, he takes it and then he agrees with the development. That is the purpose of it so one guy holding one acre under one quarter or section couldn't stop the whole thing. They have that right as the mineral owner and the oil companies do it. I don't see where the department feels their rights under this easement would be impaired. The department is purchasing the interest in the surface; you're not purchasing the surface. **Williams** said, along those lines, if money were put into escrow to account for any surface damages, the department would be entitled to a percentage of those damages as determined in the terms of the easement. It's roughly around 45% so it would be similar to if the Tongue River Railroad went through or any damage from mining, that we would be entitled to a percentage. **Murphy** said he appreciated that because that was the reason for his question. He assumes that in a lot of these other conservation easements, the language is the same. We're looking at the same kind of situation if that development happens in the future.

Mulligan - You mentioned the state land is not part of the easement process. Can you explain what that means in terms of the management of that state land, access to that state land, what the owners can and cannot do with that state land? **John Ensign** said when he stated the state land is not part of the easement, the terms of the easement do not apply to that state land. It is included in the management of the property. The grazing systems are set up to include both the state and the federal land. But the terms of the easement itself do not apply to the state or federal lands. **Mulligan** asked about access to that state land and if there would be unrestricted access. **Ensign** responded that is correct. **Hartman** said he understands that Fish and Wildlife did a mineral search of the property, and asked if they could have access to that. **Darlene Edge** agreed to give it to him.

Mulligan - Weeds. We've had these discussions on weed management in previous easements. Thought we agreed there would be distinct language in the management plan addressing weed management. Did we not get there? Don't see anything in the management plan addressing weeds. By state law, the landowner is responsible. There have been questions in the past of what will the department do with increased access and traffic, their role and holding the landowner responsible for managing weeds so it doesn't impact the easement. **Sihler** said weed management is the responsibility of the landowner. Don't recall the issue about weeds in management plans. **Mulligan** asked if there was enough language in the management plan so if the landowner or future landowners choose not to follow state law, can we hold them accountable for the destruction of habitat values? **Sihler** said that is probably a legal issue. **Mulligan** said this may not be as bad as in the Bitterroot, but it's not hard to imagine weeds seriously affecting the habitat values on a piece of property. **Sihler** said that maybe what you are asking is if there is a term of the easement that would require the landowner to conduct weed management if weeds were a detriment to the wildlife benefits of the easement and is there a term there the department could enforce? **Williams** said there are no specific terms on weed management but that would fall under our general right to enforce the conservation values of the

easement. If they took any action that interfered with that, then we would have the ability to enforce that provision. That provision is there because we know there are activities and issues that will come up in the future that we didn't think of now. The easement is drafted so we will be able to do that in the future and this could certainly fit within that. **Mulligan** said this has come up in the past and it has come up because of past conservation easement events, and may have come up as a result of the audit we had done. **Williams** said we have two protections here. The management plan is an agreement between us and the landowner, and then there is the conservation easement, which is a recorded document and agreement between us. So we have the ability to use either of two actual contractual agreements, the management plan to try to enforce that or take an enforcement action under the easement. We would have two options. **Christian** said the owners of the property would have no objection to strengthening the language in the management plan to assure that the weeds are controlled. Obviously, they have a 55% interest in seeing that the land is productive and you guys have 45%. Any language that you want to add to the management plan that addresses weed control specifically, add it. **Walker** asked if we would assume the local weed board or some such activity would normally precipitate this. **Christian** said the county sprays if you are not taking care of your weeds. One of the concerns with weeds is part of the Bice land was transferred to a charitable trust in 1996. The trust sold to a young man who didn't take very good care of it. We repossessed it in 1999 and sold it to Mr. Bice. Since his ownership, he has worked with the county. Both the Bices and the Hirsches are old-time Montana and North Dakota ranching families that are very good at taking care of their land. To assure the state that it won't be an issue if they sell their land, anything can be added to that management plan that directs they will participate in any weed program the state wants to put through.

Commissioner Lane - Somewhere there was a question of legal access to Section 15 on the Bice properties. Is there anything to that? **Bice** said it was sold off so not part of the easement. **J. Lane** said he notices an additional home site and asked the purpose of that. **Les Hirsch** responded that his place is about 11 miles long and on the Moon Creek side it was so far away he asked the department if he could have a future home site if indeed he decided to manage part of the ranch from the other end. **Sihler** said it is standard practice in easements to preserve some potential home site. The majority of our easements have some sort of reservation for a specific area for a building site for a subsequent home should the landowner decide to build. **J. Lane** asked if there were two designated home sites or just the one marked here. **Edge** said there are four on Bice's ranch and one on Hirsch's. Hirsch's does not exist. One on Bice's land to the south was an old homestead called the Mule Ranch so there are buildings there, there is the existing home where they live, and then two more existing. Then there is an additional reserved one that already has a power pole and septic system. **Don Bice** said there are three existing home sites: the main place, the trust land which has buildings there and another site that has been there forever. The other site that he reserved, which is called the old Muleshoe, sits out by itself. It has a septic tank, electricity and a trailer pad there. He wants to reserve that in case he decides he wants to build and move down there later. It's an old site. There are numerous sites up and down the river, but they want to reserve that one. There are three existing home sites that are used by family members only. **Edge** said those home sites are under the easement and can't be divided off and sold. **J. Lane** said his question was about the additional home sites. **Christian** said that is just a negotiation point as far as value, what you're buying and what they're

retaining. They are both large ranches. The idea is if you have a son or daughter or somebody else on your ranch you should have the ability to put in at least one more home. They want to reserve the right for at least one more home, negotiated for it and understood the state agreed to it.

John Lane - Still have a huge concern about these permits for point of diversion. Would hate to see us proceed when buying irrigated property that turns out to be dryland property. **Bice** responded that as the landowner involved, entered into the agreement with DNRC. They said if he couldn't put in an existing pump site, they'll let him go back to his original one. The DNRC came to him and wanted to put in a big fish drain because they were losing fish down the river through their open ditch. The existing canal was put in in the early 1900s. It was outdated and the water loss was astronomical. It was estimated they were losing 70% of their water through ground seepage. The Tongue River drainage system right now is under critical water shortage. They will be putting in metering devices and the ranch will be metered on the water they use. They have a bench at water level where the pump sites are. DNRC has to let him have a place to get water.

John Ensign - Had a copy of the SH canal closure agreement, which is the agreement between Bice Ranch and DNRC stating the canal will be closed. Under DNRC obligations, it states that DNRC will support the owner's (owner being the Bice Ranch) applications for change and point of diversion of water rights, currently diverted through the canal. This says DNRC is obligated to support those points of diversion. Another letter from DNRC states this canal closure agreement does not preclude the canal user from utilizing a different method of diversion and/or continued use of the remaining part of the canal. **J. Lane** said that what that means to him is they can put a pump in there to pump into that ditch, but we know that won't happen if they losing 70% of that water. The only viable option is for them to put in those additional pump sites. The ditch is a moot point; it's not going to happen. **Ensign** responded that the agreement between DNRC and the Bice Ranch obligates DNRC to support his change in points of diversion.

Don Hyyppa, Region 7 Supervisor - Maybe a little history would make you more comfortable with what we have here. This headgate closure project results from the Tongue Basin project, which was part of the settlement of the Northern Cheyenne Water Compact where the Tongue River Reservoir Dam was rebuilt and its capacity increased to satisfy those Compact obligations. As a part of that project, the Congress required there be a wildlife and fisheries enhancement project associated with it. Congress put in money and the department matched that money, and then went through quite an extensive public process to determine what would be the best use of that money. One of the uses that was identified was to restore the Tongue River to a more natural fishery situation. The irony here is that that project comes right back to a Department of Fish, Wildlife & Parks priority that said one of the good things we can do would be to retire those dams and put in more efficient uses of water; namely, pumping systems, and remove the fish barriers. The intent of the federal agencies, the water users, the FWP, DNRC and the tribes were not only to retire the dam, but to make more efficient use of that water and to keep that land in production. This is not a last minute thing and agreement between Mr. Bice and DNRC to

close out a dam. There is a history here and expectation here, and a lot of things motivating that coming to pass. I'm not at all worried that won't happen.

Mulligan - The document clearly shows the intent that we are purchasing interest in irrigated acres. If the landowners intentionally try to frustrate that, wouldn't we have some legal recourse to go back and enforce the change in value of that land? **Williams** responded that conservation easements restrict a landowner's ability to do certain things. We are not able to use them so they manage their land in a specific way. We can't require them to irrigate in the conservation easement. **Mulligan** said we put the requirements in the management plan. **Williams** said the conservation easement is not that type of document. We don't have specific terms saying, "You must manage your land in this way." We want them to continue the agricultural use of the land but we have not required them to irrigate. It would be unusual for us to do. **Mulligan** said he is addressing John's issue (John Lane) here where we have a negotiated agreement based on a value and then that value is intentionally changed in the short term. That seems to be strong grounds to renegotiate the costs. I'm talking contractual. **J. Lane** said it would be separate from this easement.

John Hamilton - Said he is a third generation farmer/rancher residing 42 miles southwest of Miles City on the Tongue River, and an adjacent landowner to 14 miles of this proposed easement. Find it hard to believe that you would enter into any type of agreement, which would not guarantee assets you have paid for down the road. You have already agreed to buy these assets and as of December 31, 2002, these 900+ irrigated acres will disappear. You should have some type of guarantee that whether Mr. Bice owns the property or whoever owns the property, that those irrigated acres remain on that ranch. The name of this is wildlife and habitat. You have already stated these irrigated acres are 5 to 10 times more productive than dry acres. With that much habitat loss you've decreased the value and effectiveness of this project tremendously. Comparing irrigated acres to non-irrigated acres on the Tongue River, especially in a dry year, a good comparison would be a jungle to a parking lot. The wildlife tend to congregate in those areas because of food. That green stuff along the river is what they like to eat. It's imperative that the Commission find some way to tie down these irrigated acres so in the future, regardless of who owns this property, they are required to have these irrigated acres. If a new owner gets on this property and assumes responsibility for these irrigated acres and doesn't have the money, who will do it? It is essential to do this.

Have other concerns. Presented three letters to the Commission. One is signed by 27 individuals opposing this easement in its present form, and two are personal letters describing their other concerns. All signers of the letters are adjacent landowners of this proposed easement or living in close proximity to existing conservation easements on the Tongue River. As big as the state of Montana is, one might wonder why we have two conservation easements in place in the same area and another one proposed. One of the sellers is involved in all three possibly. Consideration should be given to more diversity and individual participation. Had one public hearing, two public comment periods, revised draft environmental assessment, yet there has not been a concerted effort on local officials to address their major concerns head on. Wildlife Division Audit #98P-11, page 3, in the heading of "Selecting Habitat Projects" says the department has specific policies for doing these types of habitat projects. They are not being

followed here. They are not evaluating these things as to value. It also says the department does not have a system for monitoring landowner compliance with all types of habitat project contracts. Submitted some pictures for consideration that represent land being protected by conservation easement versus private ownership. The left side is unprotected and the right side is protected. One must ask the question on this land, "Can it really be protected"?

There are 553 million tons of state coal owned at the Otter Creek coal field. Miles City wants the Tongue River Railroad; they want a power plant. This easement is subject to the Tongue River Railroad, which will run the full length of this property north to south. It will have two tracks in some places and have been told there will be a train every 30 to 40 minutes. Coal-bed methane is a real possibility on this property. Submitted a paper explaining what the coal-bed methane is and what is going on now in Wyoming and Montana. It is not a pretty sight from what it does to the land and to water quality, which is a real issue on the Tongue River. The SAR levels above Tongue River Reservoir used to be .5 and below the reservoir now they are 1.3, a three-fold increase since they started pumping this coal-bed methane in the Tongue River drainage. The coal-bed methane is a real concern and there is no way to stop that. If the department is going to continually acquire more land, they should exercise more responsibility in taking care of this land, patrolling it and protecting the rights of adjacent property owners. This project can be better called "Access Montana," and the goal is to consume what they are trying to conserve. Charlie Russell once said he really liked people but he liked them a lot better if they were scattered. Can say the same thing about habitat and wildlife if the people are spread thin enough. The Tongue River is one of the last little slices of heaven left in Montana if you are rough and tough enough to live there. Too many people and too many easements in this area will ruin it not only for the people living there right now but in the future for everyone. Implore members of this commission to consider other areas of Montana that are not truly threatened. There isn't enough timber on the thing to amount to anything. Large tracts of land like this in the future will be more valuable sold as a unit than broken up and subdivided. This thing needs more study before approval, we all must realize this thing is forever and it is worth taking extra time to do it right rather than do it in a hurry and have it be wrong.

Paul Sihler - Coming back to John's concern about water and diversion: the appraisal is based on the highest and best use. The appraiser made the determination that the highest and best use of those irrigated acres is as irrigated land. The real issue being raised here is will Mr. Bice continue to irrigate? Don't know many landowners who don't do everything they can to make sure they are making beneficial use of their water right to maintain that water right. Part of the question is, do you think Mr. Bice is a rational landowner who wants to maintain a beneficial use of his water right? Most people assume that probably will be the case. Regarding what happens if the irrigated land is not irrigated, the canal issues aren't really relevant to that. It really is no different from asking if the Harrises on the Harris easement in the Highwoods maintain their 3,000 or 4,000 acres of wheat in production. Most of our easements have either some irrigated land or some sort of crop for which there is some benefit to the wildlife. In part, we are doing the easement with the intent of maintaining that agricultural lease. Trying to protect the wildlife habitat and protect from subdivision, but it is because the agricultural use, the wildlife habitat and interests of the landowner are all compatible that we are pursuing a conservation easement. In almost all of our easements there is probably some change that the landowner could make in

the way they're managing their land by changing their crop or eliminating a particular crop that would have some impact on at least some of the benefits that come to wildlife. It is in the same way that the irrigated land does in this instance. This all boils down to fee title ownership or conservation easements. If you want the control to be able to manage the land, then you don't want to be doing conservation easements. That is why we have Wildlife Management Areas where we take on the land management responsibility. We are responsible for the weeds, we do make the investment of the fences, we deal with the tax payments, and government owns that land. That is the way the Habitat Montana program started out as a fee title acquisition program. In 1991 the Legislature and this Commission met during the legislative session because the Legislature wasn't interested in FWP through Habitat Montana pursuing fee title acquisition. They were concerned about government ownership of land. The FWP Commission and the Appropriations Committee came to an agreement that we would pursue conservation easements as an alternative because that was a way of FWP meeting its objectives of maintaining wildlife habitat, preventing subdivision, and working with landowners. It also gave the landowners the ability to stay on the land and keep that land in agricultural production. It was a win-win for both. It benefited the landowners and made the department's money go further. If you want all of these precise management abilities on the land, you don't want us to be doing conservation easements; you want us to be doing fee title acquisition.

You have a request from the department for final approval on these two conservation easements. Are there any more questions?

Mulligan - Understand the management plan is kind of like a contractual part but it can't legally be part of the easement. Yet in the management plan it clearly states those irrigated acres will remain irrigated acres. In trying to establish habitat value and usage for the habitat, and there are times it is not irrigated, the way ranches work is if the feed isn't there, would have to negotiate with the department to reduce stocking rates because the grass would not be there to run the same number of cattle. What is lost in irrigation will be picked up in other pastures because of the requirement to leave a certain habitat value. Is that a rational thought process? **Darlene Edge** responded, "Yes, it is." **Mulligan** said with the stocking rate that is negotiated, if that irrigated land went away, could they realistically maintain that kind of stocking rate without the hay and the grass? **John Ensign** responded that the way it is set up it is summer and winter pastures. The bulk of the land is in summer pastures. They could still maintain a summer system but might have to modify something as far as the winter goes. **Mulligan** said if it isn't watered, there is a certain amount of grass that goes away that the cows can't eat as well as the wildlife. There would be a reduction in opportunity. If they weren't raising hay, then we're not going to let the cows eat some incremental increase in wildlife value. **Ensign** said it is a summer stocking rate and it is based on grass produced. Those are figures derived from BLM. **Walker** said they would be fed in the winter with the stored feed, which wouldn't be there but could be trucked in. **Mulligan** asked if some point in time of the cycle they pasture that hay ground, probably late fall? **Sihler** responded that presumably the costs will increase if they have to truck it in, but there is an alternative there.

Cal Christian - Said he doesn't know of any land in Montana that is being dried up. Everybody he represents wants more irrigated land and they want to expand their irrigation system. Mr.

Bice has $1,200/acre irrigated land. To assume that he would do anything to reduce that value to $100/acre land is hard to understand. Don't know where we're coming from. It is to Mr. Bice's total interest to keep 1,000 acres productive as $1,100/acre land. Why would he reduce it to $100/acre land and take $1 million off his price? Who is assuming that he is not going to irrigate this land? I can guarantee you that Mr. Bice is a good rancher and he is going to irrigate that land. He is not going to reduce it to non-irrigated land and no ranchers are. I just don't know where we are coming from on this? **Mulligan** said the Commission has a responsibility to spend sportsmen's dollars in a fiscally responsible way and the money they are spending based on the appraisal of irrigated ground is a reasonable assumption. Given what is in the management plan, it says it will remain in irrigated ground. Don't have a problem with it.

Commissioner Murphy - It says here in #5, page 7 of the Bice easement, "No cultivation or farming may occur on the land except as provided in the landowner rights in this easement on existing irrigated or dryland fields." In the change from point of diversion, will there have to be any changes from the standpoint of the acreage that would be irrigated? Would this be a preclusion of being able to do that? **Don Bice** responded there will be minor acres that are dryland now that will go into irrigation, and corners of pivots. We're working with total acres, not each individual acre. **Murphy** asked if theoretically does this provision potentially exclude that addition? **Ensign** responded that if you look on page 4 of the easement, E.8, the last sentence talks about the right to cultivate and says, "With prior approval by the department and to accommodate the center pivot movement, the landowners may convert the uncultivated ground that is adjacent to center pivot to cultivated ground." **Murphy** said he thought there was a contradiction there as far as those two provisions. **Sihler** said he thought it was fine.

Mulligan - Have a question on the prairie dogs on page 7 of easement. Have gotten into situations before when they established a certain number of acres and the prairie dogs started out in one circumference, kept growing and in the middle there was nothing. Is there a good understanding of what this means? **Ensign** responded that the 230 acres that is there is what is there now. The landowner is required to maintain a cumulative 230 acres of active prairie dog towns. The bulk of these towns are under five acres in size. They have the potential to come and go.

Lance Lovell, counsel for John Hamilton - As you know, John has presented three separate letters that express the sentiments of 28 landowners adjoining this project. They oppose the project, the conservation easement, on a number of grounds. I am going to urge the Commission to table this with instructions that the department and the seller of the easement meet with the landowners, particularly with my client, Mr. Hamilton, to work these things out.

First, Commissioner Mulligan is correct. You all have a fiduciary duty to the people of Montana. Mr. Hamilton mentioned the Legislative Audit Report that dinged this Commission for the use of these funds in the past. The Legislative Auditor has requested more accountability from you folks. It has requested at the outset that when a request comes from the agency you have a list of priorities to look at statewide. The first question that wasn't answered here is where could this $1.4 million be used with the existing habitat that the department owns and manages? You see the photograph that my client provided you of the protected acreage. It looks like

locusts went through it. The unprotected acreage is right next door. We're giving $1.4 million to a landowner. This is supposed to be an arms length transaction. Do you have confidence that the people that negotiated this contract for you did so and extracted the very best deal for the people of the state of Montana? You've been told that a conservation easement cannot require certain restrictions of an owner. You wouldn't have gotten that advice from me.

This is an arms length agreement. A conservation easement will assign benefits and burdens to the property. You can, and if the current seller of the conservation easement certainly intends to irrigate, then there would be no problem sending the document back with a guarantee that he and his assigns will put in the half million dollar investment for the six pump sites and go through the non-existent irrigation that will have to be developed to maintain these irrigated acres. If the Bices and Hirsches are saying that's not going to be a problem, then by all means let's hold it up for a month to get that in the contract. That discharges your fiduciary duty. The question was raised by counsel who in their right mind would think that these current owners would stop irrigating? This is an advertisement for this property. It states right in the ad that your $1.2 million is consideration for the purchaser that they're advertising for this. Everybody wants water rights.

In the $1.4 million that you're paying, what has the state really obtained? You haven't retained a restriction on him carving the riverfront up into 160s for agricultural purposes. You haven't limited the amount of private access or public access on that river. You don't have any type of recourse if there's an existing mortgage on the property and this individual goes broke and the mortgage is foreclosed upon. That mortgage company is ahead of your conservation easement and can own this land. You've paid $1.4 million for what? The homework hasn’t been done here. If everybody wants water rights, what's to stop them? Look in the document. You tell me? What, to a layperson, stops them from severing the water rights between now and the time of closing or after closing?

Everybody wants water rights. Is this an individual who is going to sell the property and parcel out all the rights? That's the history of this property. It's had 32 owners since patent. The property is owned in many estates, both surface and mineral. Many of those owners haven't even been brought to the table to discuss this easement. A conservation easement is mutually exclusive to mineral extraction and mineral development. You cannot discharge your duty while protecting that right. To pay $1.4 million for a property that the seller of the easement does not control the mineral estate is a bit reckless unless we're going to say that conservation is compatible with mineral extraction.

It was alluded to, I believe by Martha earlier, that under federal tax law to qualify for a donation, you're not getting cash, you're getting a deduction off your taxes. The donor has to control all of the title. He has to be the sole owner or there has to be a letter of remoteness from a qualified geologist that says that the chance of development of these minerals is so remote that it won't happen. You folks haven't had that fiduciary discharge yet. You don't have the mineral owners in to the table to talk about it. Mr. Hartman wasn't offered a certain amount of money not to develop his rights.

For $1.4 million don't the people of Montana deserve to not have this thing turned into a coal-bed methane site? Folks are going to be coming from Missoula, Great Falls, Helena, driving out there looking at the photo of this easement, which was the same photo that they used on their earlier easements, expecting a 30" mule deer buck and they're going to see that picture of the locusts, that'll be what they see, and coal-bed methane. They're going to say, "We paid $1.4 million for what?" What did the landowner give up? This landowner doesn't own the minerals so you really need to be dealing with more people. Other people have been left out of the equation, and I know that the department is in a very difficult spot here.

The department has, and it's a good policy, gone out and obtained habitat. The private conservation easement people who are in that business say if you're going to compete against us, you have public access on yours. That leaves their market open and limits your market. Access is not bad, but you need to listen more carefully to the neighbors who are affected. There's no reason that the seller of this easement for $1.4 million isn't required to fence, sign and adequately assure in the future at his expense the policing of these boundaries. There are holes in this easement that you can drive a truck through. Please take the time, tighten it up, put the affected people in a room, make sure that you do the right thing, let us all come back in a month or however long it takes and present you an airtight document that has given everybody a chance to work out their interests.

Commissioner Mulligan - I'd like to see if the department would like to respond to any of that.

Paul Sihler - I'm not sure I picked up all of those issues, but there are a few that I would respond to. One, the subordination of the mortgage, we have subordination agreements and at the time of closing the mortgages are going to be taken care of. Subordination is not an issue. With regard to access, there is access on the property right now. It is in block management. The easement doesn't change the status quo on access. With regard to who is at the table, the department is negotiating with the owner of the private property who we are purchasing the conservation easement from. There isn't any other owner in this transaction. The transaction is between the department and the two landowners. Those two landowners have the private property right to sell a conservation easement on their property if they choose to do that. I don't think there has been a party missing at the table on the negotiation for the conservation easement. There are subdivision provisions in the terms of the easement that are the standard subdivision provisions that we have in our conservation easements. I am not certain what Mr. Lovell is talking about creating a bunch of 160-acre tracts on the easement. There are not going to be homes going in there. There is a prohibition on development. The department is satisfied that the subdivision terms that we have in the easement will maintain the wildlife values that we are purchasing the easement for. **Mulligan** said he had a quick question on that: How would the rest-rotation management plan fit in if there were 160s there? **Edge** said they are 640. **Mulligan** said so they are 640s, at the minimum? Would the grazing rotation then have to be redone? **Ensign** responded most likely so. The easement stipulates there will be a three-pasture rest-rotation system on the property. **Mulligan** said there would be some subsequent reduction of AUMs if the pastures got reduced. **Ensign** said if the land was subdivided and a 640 was sold, the land would still be under the terms of the easement. So whoever bought that would have to go under the auspices of the easement.

Sihler said another thing he would add under the mineral rights is they have had the mineral potential assessed. They have looked at coal-bed methane. He went over it himself and met with DNRC mineral folks who are working on coal-bed methane development. Has seen the map. It is not this area; it is 30 miles from the area that is highly likely to be developed for coal-bed methane in the near future. The impacts to the easement are more probably and more likely to be water quality-related in the Tongue River, and affect every landowner along the Tongue River rather than impacts from the very unlikely probability of coal-bed methane on the easement itself. The department has made the assumption, with the attention coal-bed methane development has gotten with EISs and evaluations by both BLM and the state, those water quality issues are going to be addressed in the permitting process. We're putting some faith in the state's permitting process for coal-bed methane development that that will address the water quality impacts.

Mulligan - Could you real briefly give the basis of the evaluation; what we are buying it for? The appraisal?

Sihler - The irrigated acres are 1,185 with a value of $1,000/acre for a total of $1.18 million. The dry crop land is $235/acre, 1,250 acres, for a total of $293,000. The pasture land is $105/acre, with 10,213 acres at a value of $1.072 million. The fee title for the property was appraised in 1999 and that is what they are working off of in determining the value of the conservation easement. **Mulligan** asked if that is the standard approach used on all the easements. **Sihler** said, "Yes." Often when there is a fee title value for the property, they are purchasing the conservation easement as a percentage of that fee title value and have been using the same percentage basis used with the existing easement with Mr. Hirsch. The department has had that easement for a number of years here.

Chairman Walker - If we assumed the water wouldn't be used and remained in the river, does that water revert to the water association down there or would that be our water for in-stream flow? **Sihler** responded that the department doesn't own any water right as a part of this easement. **Walker** asked if we could potentially buy a water right as a result of this. **Sihler** said the department has the legal authority to lease water rights for up to 30 years and the department does have leased water rights around the state for in-flow water right purposes usually related to a fishery issue. The easement doesn't purchase any water right. If the department were to lease water rights, that would be a different transaction and something we'd have to work out with the holder of that water right. **Walker** then asked what happens to the water that he would no longer require if he fully establishes the center pivot, which we assume is a more efficient use of water.

Darlene Edge - Early on in this project we did discuss this with Mr. Bice and the fact he felt there was probably almost a 50% savings by converting to pivot. I approached our Fisheries Division if they'd be interested in participating in this project to basically change the use of the water and in-stream flow. As they went through the project they found several other water users who could draw that water who were senior, so, in fact, we wouldn't really see any in-stream flow increase down below the Bices. So the department decided not to try to get that water.

There was really no point in paying additional money for the water that wouldn't really stay in the river. They felt it wouldn't improve the spawning or any other fisheries issues.

Les Hirsch - I serve on the Tongue River Water Users' board. Under their bylaws, they can't take an agricultural water use and sell it to a non-agricultural use. It wouldn't be doable. That doesn't seem to be an option. **Walker** said that as brought up by Mr. Lovell, could that 50% be transferred for consideration to another agriculturalist? **Hirsch** said, "Yes, it's a private property right and you could sell that. It can be severed from the land." **Mulligan** said the easement restricts that.

Ensign - It is at the top of page 7, #3, last paragraph, "Landowners will use their best efforts to assure the retention of any and all water rights pertinent to the land that are necessary to preserve and protect the conservation values of the land, and will not transfer, encumber, sell, lease or otherwise separate such rights from the land or allow them to be lost or abandoned due to non-use or for any other reason."

Lovell - That language does not require them to build and irrigate, and whatever amount of water is necessary for your conservation easement is not clearly spelled out. That paragraph doesn't speak to the existing private rights that are of value to someone. They can be exchanged outside of this agreement.

Cal Christian -I don't agree with that. Water rights can't be severed from the land. There are rules and regulations on transferring water rights from that land. Tongue River Water Users' Association are fairly well committed to keeping that water on the land and there are rules and regulations. In order to transfer water rights on the Tongue River, you not only have to go to DNRC to transfer the water right, but you have to transfer the shares in the Tongue River Water Users' Assoc. As Mr. Hirsch was saying, they won't allow it to be used for any other purpose. I think it's fairly clear the water is going to stay with that land. We wouldn't object to any additional language that assures that.

Don Bice - I have been portrayed as kind of an ignorant North Dakotan. Some of you are ranchers and landowners. I have been portrayed that the minute I get this easement money I'm going to take the check and run, I'm going to let the noxious weeds grow, I'm not going to irrigate. You know what a ranch is worth in Montana if you have no water rights. It's worthless. Mr. Christian alluded to the fact why would I take irrigated land and turn it into dry land when everybody else who has dry land wants to turn it into irrigated land. My valuation of my ranch would go down. I still own the majority interest in that ranch. Probably 75-80% of our ranch income comes off of the irrigated land. Am I going to shoot myself in the foot? It's very simple. I don't see how we've been portrayed as such poor managers and people? **Mulligan** said he hoped he hasn't said anything to infer that and doesn't think anybody on this Commission has. This is a forever document. You aren't going to live forever. We're talking to the document language, not you as the landowner. Because it is forever, the language has to be in there to cover the owners. **Bice** said that also, he has a son and daughter who want to stay on the place. He has been in agriculture all his life and they want to stay on the place. This is one way they will be able to maintain a family-operated unit. They are a family-operated unit with one hired

man at certain times. Why would I want to do all these things and destroy their future? This is what it's been said I'm going to do -- destroy their future. I love my children and they love the land and they love agriculture. It's very simple.

Walker - It appears there is more than one alternative here. We can act on this as proposed or there are some areas where it was suggested that the department might do more work, thereby we would put this off for a period of time. Is that correct? **Sihler** responded, "Yes, I think those are two alternatives available to you." **Walker** asked if they should explore that at this stage. **Mulligan** said he is quite comfortable with what they have. Thinks the interest in delaying it has more to do with the neighbors not wanting to have additional conservation easement property next to them. Doesn't think anything they explore is going to change that. They have a right to that feeling and he might feel the same if he lived next to that much conservation easement. See no reason to delay this at all.

Commissioner Murphy - Has some unanswered questions. Hasn't seen a lot of these and that is part of his rationale. Has some concerns and not certain he is comfortable with it yet. **Mulligan** wondered what's going to change between now and the next month. What could be reworked between now and next month? **Walker** said they discussed the mineral issue but he doesn't fully understand that. Have discussed the water issue and have diverging opinions on that. Do they need some language cleared up in the document? At one time heard the department say that perhaps it should be strengthened, cleared up. Don't know that there are any doubts that they should not take the time to get this to everyone's satisfaction. **Commissioner Lane** said he is not opposed to the easement per se, but there are just certain parts he is not comfortable with and it's because he doesn't understand some of this. Would like some of it spelled out a little clearer. Feeling right now is he likes the easement but giving too much for it. He just has some unanswered questions. **Christian** said he wanted to let the commissioners know the position of some of the landowners on delays. **Walker** said they would take his comments shortly. **Commissioner Murphy** said if there are some questions should make sure they get it all settled and get it right even if it means some delay. Said he probably has some of the same reservations Commissioner Lane has. It still is not real clear to him.

Mulligan suggested if they know what they are not sure of, could they approve it contingent upon an issue being resolved? We've strung these landowners out for a long time. How long have they been working on it? **Edge** said they started on this project in 1986 for fee title, but these issues have been the last four or five years. **Sihler** said the Commission first gave the heads-up approval two years ago. **J. Lane** asked why can't these issues be resolved? Trying to do what is right for people. **Sihler** said it is not clear to him what is not resolved. **J. Lane** said they say they want permits but they aren't there. Not clear on the landowner versus the mineral right holder. Does this easement allow for an open pit coal mine? **Sihler** said, "No." **J. Lane** asked if the mineral right holder had the right to extract that. If not, then it is a "taking." **Christian** said they get compensated for the land but he has the right to open-pit mine because he owns the underlying minerals. He doesn't have the right for the surface owner to cooperate. As long as he complies with all the other rules in Montana and gets the permits, I don't think you can stop him from it. What you can do is stop the other percent ownership of the minerals. That percent doesn't have to participate. Said his feeling is they won't successfully open up a pit in

there without the blessing of the Fish and Game through the landowner. Have to be honest in an answer to your question can an outside mineral interest come in? If you own a ranch and you don't own the minerals, you cannot stop them. From my clients, we can't give you more than we own, and we only own part of the minerals. That is not going to change. **Mulligan** said there is nothing we can write or take out of this document in the next month that is going to change it. We don't have the ability or authority to change that status. **Sihler** said he senses there is some discomfort level. If you are to postpone this, don't know what the staff can do to change the comfort level. Is clear on what he has heard from John and that is a change in diversion when diversion issues were resolved. Know what that is and can figure out what needs to be done to address that. But not clear on what the department needs to do to change your comfort level. If there is a delay, need to be specific with the department on what is needed so they know what to do and how to do it so not in this position at a future meeting. If there is a delay for more information or to resolve more issues, it would be helpful to be clear to the department on what issues and what things need to be resolved. **Walker** said he brought up the thing on minerals because of continuing concern about that. Looking at a letter that Mr. Hartman left dated the 20th. He indicates in the letter, "I understand that a mineral search was completed recently. I feel that all non-surface mineral owners need to be noticed as their rights are affected also." Was a mineral search done and did it not affect all mineral holders? Is that a problem? More concerned about them than the neighbors. Our deal is with Mr. Bice and Hirsch. It is not with the neighbors.

Williams responded that the actual search for the minerals is part of doing their job. Need to do that search to know who owns the minerals. Doing that doesn't infringe on the rights of the mineral owners at all. It's like a title search they do with every project. Legally, they cannot affect the rights of the other mineral owners through a conservation easement. But have heard today that, practically speaking, some of the mineral owners may be affected if they need all of the owners together for a company to agree to work on development. That way are affecting them, but legally are not. **Walker** then said, "So it is their responsibility to be part of the process, and we have legally noticed so we have satisfied that." **Williams** said, "Right, through environmental review process." In addition, their rules are set up so they need to let adjacent surface owners know of these projects. But don't have anything in the rule that directs them to notify all mineral owners. It would be very difficult in the future to notify all mineral owners and it is difficult to find all of them. There often can be very many with a long, convoluted change of title, so that's not practical.

Murphy - Can Paul or Martha or someone unquestionably convince him that if mineral rights owners decide they want to develop those mineral rights, the department cannot, through this easement, in any way jeopardize the ability of those outside mineral rights to do what they want to do? Because that's what we're talking about, the private property rights associated with those mineral rights, not the landowners. **Christian** responded that you cannot stand in any stronger position than the Hirsches and the Bices. The Hirsches and the Bices can't affect their rights, and you can't affect their rights. You cannot get more title from them than they hold. That's just a matter of a real estate law. The only title they hold is just a fragmented part of those minerals. That's why you don't have to give any legal notice, because you can't affect them. If I sold the ranch to you as an individual, you don't notify the mineral owners but you disclose in the title

report if you did a mineral search that there are outside mineral interests. You can be one of two types of buyers: You can be a buyer who says he is not going to worry about it if there's not going to be any imminent deal and if they do he gets surface damages and participates. Or he can be the type who says he won't buy it because he doesn't get all the minerals. They don't have the ability to buy all the minerals. They are not available to them. But guarantee they cannot give something they don't own. Can't give more than they have and don't have the right to stop them.

Sihler said his understanding is the mineral estate dominates. It's not any different than your property, someone owning minerals under your property and you can't stop them. Have all sorts of places where that's an issue. **J. Lane** asked if they wanted to develop coal-bed methane, does this easement preclude them from putting in a pump station, or a pipeline, or anything like that? **Sihler** responded that the language in Section 7 they were looking at earlier related to the mineral rights and it relates to the significance of the impact. The term "significance" is defined in Administrative Rule in the MEPA rules. Clearly, there is a process here by which it is possible to have some development. Can't tell you blanket, not knowing what the development is going to be, that it would be permissible. The Regional folks have indicated all along that they think there is development of coal-bed methane that can be done in a way that doesn't impact the conservation values of the easement. Certain there probably also is an imaginable scenario where there could be development that might impact the values of the easement and would be significant as defined in the MEPA rules. Absent a proposal, can't give a blanket answer without knowing what the facts are. Can easily imagine a situation based on what John Ensign, the Wildlife Manager, tells him that there are instances where that development might be possible on the property without conflicting with the easement. Can also imagine there are probably ways to do it that would conflict. Can also imagine that coal-bed methane could be developed in the fields 30 miles to the south and there could be an impact on the Tongue River water quality that would affect the easement that is completely outside of the scope of anything in the easement. He is putting faith in the regulating and permitting process that that won't happen.

Mulligan said whatever rights the current landowners have for reimbursement or reclamation from those impacts, the easement doesn't change that. The only difference is now we would be in the mix on determining what the appropriate corrective action is. **Sihler** said, "Correct, we have now have some title to the property through the conservation easement and would be the recipient of however those mineral surface impacts were mitigated by the development. **Murphy** said that the way this reads in #10, "The landowner shall seek prior approval from the department and submit a plan for department review and approval." This is in regards to looking at developing minerals. **Sihler** said, "The landowner's minerals, yes." **Murphy** said he thought this said that the landowner couldn't develop those. **Sihler** said the appropriate language is the fifth line, about two-thirds of the way through that line, it says ". . . would significantly impair or interfere with conservation values of the land is prohibited." The qualifier there is "significantly impair or interfere." Mineral development that would have a minor impact would not be prohibited. What is prohibited are things that would significantly impair or interfere with the conservation value. It is not a straight prohibition on mineral development. It is a prohibition on things that are going to have a significant impact on the easement.

Don Hyyppa, Region 7 Supervisor - Have been involved with easements in different ways for a number of years. It might be helpful for those new to it to hear about how he looks at this. First, makes assumption going in that the subsurface will rule. The mineral rights are superior to the surface rights. Going into an area and knowing that, have to take a very good look at what you think the potential risk to the surface is. In the case of this easement, they think there is a reasonable assumption there could be coal-bed methane development occur on the property. They also think that, because of the way they have viewed the industry to evolve and what they expect to happen as the result of current practices, the easement is compatible with responsible development. On the other hand, they had the opportunity two or three years ago to accept an easement at the head of Tongue River Reservoir. It was part of this Tongue Basin project. In that case, it was required that lands lost for habitat due to the rising water level had to be replaced by some permanent conservation. Were offered a conservation easement at the head of the reservoir and the company, Decker Coal, wanted to retain the mining rights that were right next door to the mine. Didn't take much to conclude that an easement that didn't protect against coal mining right next to a coal mine wasn't going to buy an awful lot of conservation. So they turned that easement down. Suggesting what all that means is they need to take a look at and calculate the risk to the surface. They don't think there is substantial risk to the surface here, or they wouldn't be here suggesting you purchase this easement.

Walker asked if there was a motion to consider this or, in the alternative, to seek more information. If we have one to seek more information, would do that first.

ACTION: ***Mulligan*** *moved approval of the conservation easements as presented;* ***Walker*** *seconded, and said with the present format, it takes three to pass this for a majority. Commissioner Dascher did not provide a proxy. She had concerns, but just stated them as concerns and he hopes they have addressed that.*

Commissioner Murphy asked to add one more thing. Is there the likelihood or potential that within this motion they could be looking at some potential for amendment at this point in regards to that easement? **Walker** said, "Yes." **Murphy** said he was thinking about weed control and some of those things. Maybe these are basic to all those easements, weed control provisions and things of that nature. **Christian** responded that from the owners' standpoint they have made a statement on the item, weed control, that they would accept as a matter of record additional language, but they would not back from that if the easement is approved. Perfectly willing to work on any adjustment language in that regard. This is not only for weeds. There are some other items but can't remember them. **Mulligan** said on things like weeds that can go in the management plan and that can be changed. **Sihler** said maybe the way to answer that is if putting things into the management plan, those things could fairly easily be amended. If making a significant change to the terms of the easement and/or there is some affect on value or other ramifications of the change, might need to do something additional. Would depend a little bit on what change you wanted to make. Weeds is an example for the management plan.

Murphy said he agreed with Mr. Bice in that the ranch and the value of those water rights is extreme. To take those water rights away from that land would be a poor business decision. John brings up the point those permits aren't in hand. If, in fact, for whatever reason those water

rights were to be removed, is there a provision within this lease should the value of that conservation easement be reduced associated with the loss of that water on that land and those irrigated acres? Is that something that could be included within the provisions of this easement? **J. Lane** said what he wondered was could the motion be contingent upon the acquisition of those diversions? **Williams** said she couldn't speak for the landowner, but could put in purchase agreement a condition of closing the transaction upon the approval of the points of diversion. **J. Lane** asked if they could also add the development of the irrigation center pivots or whatever means they have of irrigating. It's fine to get the points of diversion, but what if they aren't put into practice through the use of center pivots, or wheel lines, or whatever means they have of putting the water on the ground? **Sihler** responded that as a practical matter, didn't think they could make the closing contingent upon their having put the center pivots in. **J. Lane** asked if they could make it contingent upon the points of diversion being acquired. **Christian** said they don't have a problem with that.

ACTION - Mulligan *amended his motion to make it contingent upon the points of diversion being acquired.* ***Walker*** *seconded that amendment.* ***Vote: 3-1****. Three in favor were* ***Mulligan, Murphy, Walker****; and opposed* ***J. Lane****.*

12. Snowmobile Water Skipping Rule - Final. Beate Galda, Enforcement Division Administrator - Comments were 2-1 in favor of the rule as proposed. There were two public hearings and at those public hearings almost all the participants were opposed to the rule. There were five people speaking in opposition and one in support. Reasons given for opposing the rule as proposed were: there is too much regulation already and they prefer people take personal responsibility for their choices, it is no more dangerous than other sports that are not regulated, should at least allow sponsored events, should give emergency rule a chance, and it is allowed in other states. Reasons in support of the rule included: safety reasons, conflicts with other water users, Montana does not have that many publicly accessible lakes, rivers and streams, it causes pollution, it harms shorelines, is disruptive to fish and waterfowl, it is noisy, designed for snow and not water, rescue is costly, there are public costs in dealing with the problems, and they can use private ponds. FWP feels it is still in the best interests of public safety and public welfare not to allow snowmobiles on publicly accessible waters in Montana. They will be able to use private ponds if they get permission of the pond owners. It increases regulations, yet it is a safety issue, particularly for other boaters, swimmers and anglers. Therefore, the department recommends that the rule be adopted as proposed.

Commissioner Murphy said he voted to put this out for public comment, but does have a very strong concern with regards to total elimination and ban of this activity. If an individual wants to risk a $7,000 machine to put it out in the lake, as long as they are meeting environmental conditions and criteria, personally has a real concern with a total restriction. At the very least, would like us to look at allowing a sponsored type of activity. Don't have a proposal in mind as to how to handle that. **Mulligan** said he doesn't have a problem, either, with someone wanting to do that. That's why feels they can still do it on private ponds. His concern is with the rest of the people using the water. Not trying to protect the people riding the machines and that's why it shouldn't be allowed on public water. We're not inhibiting it on private ponds.

Murphy - Concerned about the public safety issue, but we could set this up so it is a sponsored event. Other states have the same type of activity going on, in fact, a lot more of it. They allow it and in most cases they are doing it responsibly. No matter what we do with the restriction, if somebody decides to try to fly their snowmobile across the water, they will probably do it. Don't want to see us specifically prohibiting that activity entirely. Under a sponsored environment, the sponsors can be responsible and certainly there are laws on the books to cover somebody acting irresponsibly and hurting someone else out there. Those sponsors of that event could do what is necessary to ensure that the public is being protected.

***ACTION: Murphy** - With that, move that this rule be amended to allow for approved sponsored events*. (Not sure who the public would go to to get that sponsored event approved, whether it be this department or somewhere else.)

Galda - The events would go through this agency or this commission because we are the agency that has regulation of publicly accessible waters. The decision-making on whether to allow an event or not would be with the agency if you choose to delegate that to the agency. It would probably require an EA on that type of event. It would take some time. They would have to apply well in advance. As far as shifting the responsibility to another party, there might be a possibility of asking that they have to provide insurance. Otherwise, as the permitting agency, we still have liability. So if something goes wrong, we are the agency they would sue. It would not be a simple process and there would probably have to be some kind of public hearings. We do this on boat races, but they are a little more accepted. At least for a few years, there would be a lot of controversy. They would not be easy decisions. **Murphy** asked if there was a snowmobile race on the ice, are those sponsored events that have to be approved by anyone? **Galda** responded that the Forest Service normally does them because they are usually on Forest Service lands. On the ice we haven't gotten involved very much. It will usually be whatever is the adjacent land. It is usually either State Lands or the Forest Service that approves poker runs and those sorts of events. **Murphy** asked if the Forest Service then would be in the same position as far as the liability associated with somebody being hurt. **Galda** said, "Definitely." We have certainly been sued on snowmobile use, snowmobile trails and failure to groom. There have been some big judgments against the state on those. It is a concern and it is a concern with most sports, except that this is a new sport that is a little different. **Murphy** said that is part of his logic; in the minds of those who want to do it, this is just another sport they would like the opportunity to be involved with. Doesn't like the idea of putting into play a rule that might cause some additional liability on the part of the state. The alternative is not to do anything so the state is not liable.

***ACTION: Chairman Walker** - We have a motion before us to accept your proposal, as amended by Commissioner Murphy, to allow for sanctioned water skipping races on state waters knowing it will take additional work to craft that amendment In order to have a vote on that, **I will second it**.*

Mulligan asked if that would mean another ARM rule? **Galda** responded that she thought it would have to go out for public comment with that provision because that hasn't been an alternative. It would have to go out for another round of public comment and we'd have to set up

some standards to do that. **Murphy** said he thought the rule would probably have to reflect who. **Galda** said how the applicant gets to that point, what the decision process is and that sort of thing. **Director Hagener** mentioned they had this discussion before, but wouldn't it also require having to amend our wake speed regulations on several ponds? **Galda** responded that since they are not defined as a watercraft, the no-wake rule doesn't apply to them unless the Commission decides it does. Right now they are kind of in that no-man's land because they are excluded from the definition of watercraft and the no-wake zone regulates watercraft. It was not something that was contemplated at the time the no-wake rule was created. **Hagener** said we will probably have to address it somewhere because there are a lot of people who want that no-wake zone and are very adamant about that. If we all of a sudden allow it to be breached by snowmobiles that are not a watercraft, it isn't going to sit very well. **Galda** said we definitely would need to go out for more public comment with the proposal. **Walker** asked if they were well advised to be voting on this at this stage. **Hagener** said if we're to move forward will probably have to bring back in the next month or so what the revised amendment is and how it would influence whatever else is there.

***ACTION: Walker** - Withdrew his second of the motion as amended. For lack of a second, the **motion failed**.*

***ACTION: Walker** - Move that we accept the water-skipping rule as presented; **Mulligan** seconded. **Motion passed 3-1**; Commissioners Mulligan, Lane and Walker voted for the motion, and Commissioner Murphy voted against it.*

Meeting adjourned at 3:15 p.m.

Work session

Keith Aune, Wildlife Laboratory Supervisor - Gave a summary presentation on chronic wasting disease in Montana as well as some of the surrounding states.

Approved this 18th day of April, 2002.

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Dan L. Walker, Chairman **M. Jeff Hagener, Director**